CASES

DETERMINED IN THE

UNITED STATES CIRCUIT COURTS,

FOR THE EIGHTH CIRCUIT.

REPORTED BY

JOHN F. DILLON,

THE CIRCUIT JUDGE.

VOLUME II.

DAVENPORT, IOWA:

DAY, EGBERT, & FIDLAR.

1878.

Press of Day, Egbert, & Fidlar, Davenport, Iowa.

Dedication.

TO THE HONORABLE

JAMES GRANT.

FOR FIVE AND THIRTY YEARS WE HAVE LIVED IN THE SAME TOWN,
AND DURING THE LATTER HALF OF THAT PERIOD MUCH OF MY
TIME HAS BEEN SPENT IN YOUR LAW LIBRARY: IT GIVES ME
PLEASURE TO AVAIL MYSELF OF A GRACEFUL USAGE
TO RECORD MY HIGH REGARD FOR YOU AS A
LAWYER AND A CITIZEN, AND MY SINCERE
ATTACHMENT TO YOU AS A FRIEND.

In Memoriam.

AT the opening of the circuit court for the district of Nebraska on Thursday, May 8, 1873, the Circuit Judge announced the death of Mr. Chief Justice CHASE, saying: —

"GENTLEMEN OF THE BAR: The telegraph brings us this morning the sad intelligence of the death, on yesterday, of Chief Justice CHASE. It is fitting that all classes of citizens should pay appropriate honors to the memory of one who for more than a quarter of a century has worthily filled so many places of public trust and confidence in the country. It is especially fitting that this should be done by the courts of law, and particularly by the courts of the United States. The illustrious deceased was the head of the national judiciary. He occupied the seat which the professional as well as the popular mind, associates with the great and venerable names of MARSHALL and TANEY. The seat to-day is vacant. The Chief of the highest tribunal on earth — a tribunal more august than the Amphyctionic Council — a tribunal endeared to the American people by the spotless character of its individual members, and by the unclouded splendor of its reputation — lies, after a long life of usefulness and honor, silent in death."

The court appointed a Committee of the Bar to draft appropriate resolutions, which were, on the following

day, presented to the court by Mr. JAMES M. WOOLWORTH, the chairman, with appropriate remarks.

The following are the resolutions: —

"*Resolved*, That the death of the Chief Justice of the United States, announced in fitting terms by his honor, the presiding Judge, has closed a career of eminent service and beneficence. In the first conflict with the arrogant slave power, he stood forth a stalwart figure, inspired by the loftiest philanthropy, and sustained by an unconquerable courage, and did dauntless battle for the weak and the oppressed. In the great rebellion, which drained the best blood of the people and the vast wealth of the land, and the inexorable demand still unsatisfied, called for new and strange devices for replenishing the treasury of the Union, his wisdom conceived, developed, matured, and executed a series of financial measures which supplied the great necessities of those times, and in these days of peace form an integral part of the government. And in that highest human dignity in which we most delight to honor him, the Chief of the august tribunal over which he presided, adjudicating the new questions to which the war gave rise, and expounding the novel phases which the federal power has assumed, he towers before us a character solid, massive, and pure — the peer of those greatest of our country's magistrates, MARSHALL and TANEY.

"*Resolved*, That while we mourn the loss which the nation has sustained in the demise of this great and good man, we rejoice that his life was so long protracted to be illustrated by services so beneficent and noble to his country and race."

On behalf of the court, the Circuit Judge responded:

"We assure the bar that the court fully shares in the sentiments respecting the illustrious deceased, and his services and character, so appropriately expressed in the resolutions just presented, and in the eloquent observations with which they have been accompanied.

"It is not necessary to recount the history or services of the late Chief Justice. For more than twenty-five years his life has been spent in public employment, and in the public eye. To him have been committed, at various times, high executive, administrative, legislative, and judicial trusts. He has been called upon to act in many of the decided epochs which have marked the marvelous growth and development of our country during his time, and he has demonstrated his greatness by rising always to the full height of any demand made upon his intellectual resources.

"There is one portion of his public history which his countrymen, and lovers of constitutional liberty in all lands, now and hereafter, will cherish with peculiar interest. I allude to his services throughout the civil war as the counsellor of the lamented Lincoln, and as finance minister. Instead of pressing the securities of an imperilled nation upon the timid and unfriendly capitalists of the old world, he appealed with confidence to the people, whose highest interests were at stake. The result attested his wisdom, and surprised the world and even ourselves. To him, as Secretary of the Treasury, may justly be applied, in all its scope, the magnificent and striking eulogy which Webster pronounced on Hamilton: 'He touched the dead corpse of the public credit, and it

sprang to its feet. He smote the rock of the national resources, and abundant streams of revenue gushed forth.'

"I am aware that the opinion has, to some extent, prevailed, that Mr. CHASE did not increase his reputation by his services as Chief Justice of the Supreme Court. I do not concur in that opinion. In intellectual capacity, in purity of life and character, I regard him a worthy successor of the great men to whose seat he succeeded. Before his health gave way he seemed to do as much work in the Supreme Court, and on the circuit, as either of his associates, or as any of his predecessors had done. Some of his published judgments, particularly those respecting the constitutional powers and relations of the state and federal governments, and those concerning the novel questions which grew out of the civil conflict, in logical force, clearness, and finished beauty of expression, take rank with the best opinions of Sir WILLIAM SCOTT or Lord MANSFIELD, and scarcely fall below those of even MARSHALL himself.

"We join with the bar and with all classes of citizens in mourning the death of the Chief Justice, and in desiring to pay honors to his memory.

"Accordingly, the resolutions presented will be ordered to be entered of record, and the court will be adjourned during the remainder of the day."

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS,

FOR THE EIGHTH CIRCUIT.

Hon. SAMUEL F. MILLER, LL. D., Supreme Court Justice assigned to the Circuit.

Hon. JOHN F. DILLON, LL. D., Circuit Judge for the Circuit

DISTRICT JUDGES.

Hon. RENSSELAER R. NELSON, Minnesota.

Hon. JAMES M. LOVE, Iowa.

Hon. SAMUEL TREAT, Eastern District Missouri.

Hon. ARNOLD KREKEL, Western District Missouri.

Hon. ELMER S. DUNDY, Nebraska.

Hon. MARK W. DELAHAY, Kansas.

Hon. HENRY C. CALDWELL, Eastern District Arkansas.

Hon. WILLIAM STOREY, Western District Arkansas.

ACTS OF CONGRESS CONSTRUED.

CASES REPORTED.

REPORTS

OF

CASES DETERMINED

IN THE

Circuit Courts of the United States,

FOR THE

EIGHTH JUDICIAL CIRCUIT.*

ZENAS E. BRITTON *v.* PLATTE CITY.

1. Under the *General Statutes* of Missouri a judgment creditor of a municipal corporation where an execution has been returned unsatisfied, is entitled to a writ of *mandamus* to compel its officers to levy and collect, under the direction of the court which rendered the judgment, a *special* tax to pay such judgment and costs.
2. This power and duty on the part of the municipality is not restricted by a provision in the charter of a city, authorizing it to levy for ordinary municipal purposes a *general* tax not exceeding a specified rate.

(*Before* DILLON, TREAT, AND KREKEL, JJ.)

Municipal Corporations.—Mode of Enforcing Judgments.—Mandamus to Collect Tax.—Construction of General Act and Special Charter as to Rate of Taxation.

BRITTON obtained judgment in this court, November 5, 1870, for $8,458, damages and costs, against the corporation

*Formerly the organization of the circuit court for the eastern district and the western district of Missouri was peculiar (1 Dillon, C. C. 1). In the year 1872, Congress established a separate circuit court in each of these districts. Some of the cases here reported were decided before and some after this change was made. By what court each case was decided and what judges were present is indicated in the reports.

named The Inhabitants of the town of Platte City, in an action on the case for injuries received by reason of a defective sidewalk of the city. An execution was issued November 29, 1870, and on December 15, 1870, it was returned *nulla bona*. Whereupon, this application for a writ of *mandamus* was made on the 29th day of June, 1871, against the respondents, the trustees of said corporation. An alternative writ was issued returnable to this term. The city by its trustees return to the writ, in substance, that by its charter the city is authorized to levy a tax not exceeding one-half of one per cent per annum; that the assessed value of all the taxable property of the city does not exceed $200,000; that a tax of one-half of one per cent as well as the poll tax authorized by the charter has been already levied and is being collected with a view to pay the judgment of the relator, which will yield not to exceed $1,000. To this return the relator demurs.

The several charters and laws applicable to the present inquiry are as follows: —

Act of February 3, 1853 (Laws 1853, p. 61), incorporating the town of Platte City. By the seventeenth section the act is made a public act; by the first section the corporation may sue and be sued. Sec. 9. "The said board of trustees shall have power by ordinance to levy and collect not exceeding fifty cents in any one year on all white male inhabitants of the town over the age of twenty-one years; also to *levy and collect taxes* on all real and personal property within the limits of said town, not exceeding one-half of one per cent upon the assessed value thereof."

By an amendatory act, approved January 14, 1860 (Laws 1859–60, p. 379), it is provided: The board of trustees shall have power to levy and collect taxes on all real and personal property within the limits of said town, not exceeding *five* per cent on the assessed value thereof; *provided*, a majority of the legal voters of said town of Platte City shall so in-

struct the board of trustees, either by petition or by an election regularly held for that purpose each year, that a levy exceeding one-half of one per cent upon the assessed value of the taxable property in said town is levied.

By the *General Statutes* of Missouri, 1865, chap. 160, sec. 10, p. 641, it is provided that "all court-houses, jails, clerks' offices, and other public buildings and the lots of ground on which they stand, shall be exempt from attachment and execution when owned by the county in which they are situate, or any municipal corporation therein."

And in the same chapter, in section 77 (p. 650), it is provided: "Whenever an execution issued out of any court of record in this state against any incorporated town or city shall be returned unsatisfied in whole or in part, for want of property whereon to levy, such court, at the return term or any subsequent term thereof, may, by a writ of *mandamus*, order and compel the chief officer, trustees, council, and all other proper officers of such city, or town, *to levy and assess and collect a special tax* to pay such execution and all costs.

"Sec. 78. The court shall determine the time within which the levy and collection of such tax shall be made, and shall make all necessary orders to secure the prompt and speedy payment of such debt.

"Sec. 79. Any officer or officers of any such town or city failing, refusing, or neglecting to comply with any such order of court, shall be deemed guilty of a misdemeanor, and shall be fined and imprisoned as for a contempt of court."

The Judiciary act, 1789, section 14, confers upon the United States circuit courts the power to issue writs of *mandamus*: —

"That courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be neces-

sary for the exercise of their respective jurisdictions, and agreeably to the principles of the common law."

Noble & Hunter, for the relator.

Sharp & Broadhead, for the city.

DILLON, *Circuit Judge.*—The substantial question argued and which counsel wish to have decided is, whether the city has the power to levy or can be compelled to levy any other than the general tax of one-half of one per cent. The city maintains that this is the limit of its power, and that having already levied this tax to the full extent of the charter rate, it has discharged its duty and its whole duty, and cannot therefore legally be compelled to do more. On the other hand, the relator claims that under the provisions of the general statutes of the state mentioned in the statement of the case, he is entitled upon the return, to an order commanding the city "to levy, assess, and collect a *special* tax" to pay his judgment and costs. That the general statute applies to this city has not been denied; but it is insisted by the counsel for the city that it does not enlarge its taxing power as prescribed and contained in its charter. If the charter stood alone and contained a fixed limitation on the rate of the only taxation authorized, it might be true that the rendition of judgments for *torts* could not have the effect to enlarge the taxing power or abrogate the restriction on that power contained in the charter. But that is not this case. Here the charter provides for a *general* tax for ordinary municipal purposes, and the general statutes provide in addition a *special* remedy for judgment creditors, to-wit: a *special* tax to be levied and collected under the direction of the court of record which rendered the judgment. (Gen. St. 1865, ch. 160, secs. 77, 78.) When it is considered that this is a special tax, that it is to be levied and collected under the order of the court, it is clear that it is a

tax other and different than the general tax provided for in the charter.

It is admitted that the power to tax or to authorize the levy of taxes must be plainly conferred. But when, as here, the legislature has in terms enacted that the court may "order and compel" the officers of a city "to levy and collect a special tax" for a specified purpose, and makes it criminal in them to neglect or refuse to do so, the authority to execute the order is clearly granted. The intention of the legislature that a tax might be levied is very much more clear than in the cases from Iowa to which reference has been made. *United States* v. *Burlington*, 2 Am. Law Reg. (N. S.), 394; *Clark* v. *Davenport*, 14 Iowa, 494; *Butz* v. *Muscatine*, 8 Wall., 580.

The demurrer to the return is sustained and a peremptory writ ordered.

TREAT and KREKEL, JJ., concur.

JUDGMENT ACCORDINGLY.

NOTE.—As to charter limitations on the rate of taxation, see cases cited, Dillon, Munic. Corp. sec. 107.

Mandamus, as a mode of compelling public and municipal corporations to perform their duties towards their creditors: See *Knox Co.* v. *Aspinwall*, 24 How. 376; *Riggs* v. *Johnson Co.* 6 Wall. 166; Dillon, Munic. Corp. sec. 685 *et seq.*; *Welch* v. *Ste. Genevieve*, 1 Dillon, C. C. 130; *Lansing County Treasurer, Ib.* 522.

The circuit court of the United States has no power under the judiciary act to issue the writ of *mandamus* as an *original* proceeding, but only as ancillary to a jurisdiction already acquired; and hence, creditors must first obtain judgment on their debt, and then the court in proper cases may issue the writ (which is in the nature of an execution) to enforce the levy of a tax to pay the judgment. *County of Bath* v. *Amy*, 14 Wall. 244; *Riggs* v. *Johnson County*, 6 Wall. 166

SANFORD, Assignee, v. LACKLAND, et al.

1. **All the property of the bankrupt, except such as is specially exempted, vests in the assignee in bankruptcy.**
2. **A testator cannot give a devisee the beneficial interest in the estate devised, and annex to it the inconsistent condition that it shall not be liable for his debts, but he may provide that the estate of the devisee, on his becoming a bankrupt, shall determine and go somewhere else.**
3. **A testator gave to trustees an estate for the benefit of his son, but with directions that the trustees should hold it and its accumulations until the son should reach the age of twenty-six years; he was adjudged a bankrupt at the age of twenty-four years: *Held*, that the assignee in bankruptcy, as against the bankrupt, was entitled to the property held by the trustees.**

(*Before* DILLON AND KREKEL, JJ.)

Bankrupt Act.—What Property Vests in Assignee.—Beneficial Interests Under Will.

APPEAL from the district court of the United States for the eastern district of Missouri.

The plaintiff is the assignee in bankruptcy of Wm. C. Hill. The defendants are Wm. C. Hill, Lackland and Clark, the executors and trustees named in the will of James B. Hill, and Edwards, trustee in a deed of trust for the benefit of Mathews, executed by William C. Hill on the property in controversy. The question in the case is, whether, subject to the Mathews' deed of trust, the assignee in bankruptcy is entitled to the interest and right of William C. Hill in the property held by the executors or trustees named in his father's will, consisting of stocks, notes, and real estate. The essential facts are these: In 1862, James B. Hill, the father, died, leaving five children, three sons and two daughters. His will, admitted to probate in March, 1862, so far as material to the present controversy, is in these words: "All the residue of my

estate, real, personal, and mixed, I give, devise, and bequeath unto Rufus J. Lackland and William G. Clark, and to the survivor of them, as trustees, in trust, however, to manage, control, and improve the said estate; to receive and collect the debts due me; to receive and collect the rents, issues, and profits of said property; to reinvest any money that may come into their hands as they may deem best or therewith improve any unimproved real estate, to rent or lease any portion of said real estate; and I do hereby invest them with full and complete authority to sell and convey in fee simple any of my real estate, and to reinvest the proceeds of such sales in other real estate, or otherwise, in their discretion, and in trust, as aforesaid, to manage, control, and keep together, my said property as one entire whole; and as I now have five children, to-wit — James B. Hill, William C. Hill, Anna M. Hill, Frank W. Hill, and Mary Hill, upon the further trust, *First*, Until my children respectively arrive at the age of twenty-one years, or get married, to provide for their support, maintenance, and education out of said estate, which support, maintenance, and education is to be taken as part of the expenses of my estate; *Second.* My said trustees shall, out of my said estate, pay to each one of my children (if in their opinion such advancement shall not probably amount to more than the equitable share of such child in my estate) as they respectively arrive at the age of twenty-one years, the sum of ten thousand dollars as an advancement, and shall, from the time of such advancement, charge such child with interest thereon at the rate of six per cent per annum, if such advancement be made before the partition hereinafter mentioned; *Third.* When my eldest child shall arrive at the age of twenty-six years, or if he shall not so long live, then when the next oldest surviving child shall attain that age, my said trustees shall, with the approval of the probate court of St. Louis county, make a partition of all said trust

estate among my said children, share and share alike, charging, however, in such division and partition, any child who may have received an advancement as before mentioned, with such advancement, with interest thereon from the time when received as part and portion of the share coming to such child, and upon such partition shall forthwith convey to such eldest child, if such eldest child be a son, the portion allotted to him in *absolute property*, but shall *hold* the shares and portions of the others of said children *until* they severally arrive at the age of twenty-six years; and as the sons severally arrive at that age they shall convey to them the share and portion allotted to such son in absolute property." [And then follows a similar provision as to the share of the estate coming to the daughters.] "After the said partition shall have been made, my said trustees shall keep the portion and share of each of my children separate (except as before), with the rents, issues, and profits belonging to such portion."

On January 29, 1870, James B., the eldest son, became twenty-six years of age, and thereupon the trustees in the will, with the approval of the probate court, made partition of all the property held in trust among all of the children, and there was an order of distribution in accordance with the terms of the will. The property allotted and set apart to the said William C. Hill consisted of specified stocks in certain banks, promissory notes, and real estate, which are still in the possession and custody of the trustees. On July 6, 1870, William C. Hill executed a deed of trust on the property which had been allotted to him to Edwards, trustee for Mathews, to secure ten thousand dollars, which is yet unpaid. The trustees under the will advanced to William C. the ten thousand dollars on his becoming twenty-one years of age. On November 28, 1870, a petition for adjudication in bankruptcy was filed against him, and he was adjudged a bankrupt. The property in the hands of

the trustees belonging to him is of the value of $30,760, and he is now between twenty-four and twenty-five years of age.

The bill sets out the foregoing facts, and prays that the property in the hands of the trustees allotted to William C. Hill may, subject to the incumbrance of Mathews, be decreed to belong to the assignee in bankruptcy. The district court overruled a demurrer to the bill, and entered a decree as prayed. The trustees and the bankrupt appeal.

Cline, Jamison, & Day, for the complainant.

Slayback & Haussler, and *Lackland, Martin, & Lackland*, for the defendants.

DILLON, *Circuit Judge.*— The share of the bankrupt in his father's estate has been duly ascertained and set apart in severalty to him, but with the exception of the ten thousand dollars advanced on his attaining his majority is yet in the hands of the trustees, as he was not twenty-six years of age at the time he was adjudicated a bankrupt. By the bankrupt law, all the property of the bankrupt, with certain exemptions not necessary to be noticed, vests in the assignee (sec. 14); and if William C. Hill owned or had a beneficial interest in the property in the hands of the trustees, it passed under the bankruptcy. That he was the owner of the property which had been allotted to him under the will can scarcely admit of a doubt. The will directs a partition of the trust estate to be made among the children, and this has been done, but it also provides that the trustees shall hold the shares of the children until the sons shall severally arrive at the age of twenty-six years, when they are directed to convey to such son his portion in absolute property.

This is not the case of a legacy or gift to vest if the

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legatee shall arrive at a specified age which has not yet been reached. Nor is the devise or gift to the son made on any condition; there is no limitation over in case the son shall, before attaining the age of twenty-six, become a bankrupt. If William C. had not been adjudged a bankrupt, and had died intestate before reaching the age of twenty-six, can it be doubted that his heirs would have taken the estate? It has not been questioned, nor could it be, that he had the power to mortgage this property for the money borrowed of Mathews. If the intention of the testator was to prevent the property from being liable for the debts of his son, his will fails to express that intention. The testator might have provided if the son should become bankrupt before reaching twenty-six, that his estate should then determine and go somewhere else; but he cannot give the beneficial interest and annex to it the inconsistent condition that it shall not be liable for the debts of the devisee. And in fact the father has not attempted to do this. The estate is given, and the only limitation expressed in the will is that the trustees shall *hold it* and its accumulations until he shall reach the specified age. The trustees have no beneficial interest in the estate they hold. By operation of the bankruptcy, William C. Hill has no longer any interest in it. It belongs to and is vested in the assignee for the benefit of creditors. The trustees now hold the property in trust for the benefit of these creditors, and as the strict execution of the trusts in the will have been thus rendered impossible, the court properly decreed that the property held by the trustees for the bankrupt should, subject to the Mathews incumbrance, be conveyed to the assignee in bankruptcy.

The decree of the court is affirmed.

AFFIRMED.

KREKEL, J., concurs.

NOTE.—In full support of the foregoing views, see: *Graves* v. *Dolphin*, 1 Simons, 66; *Green* v. *Spicer*, 1 Russ. & Mylne, 395; *Brandon* v. *Robinson*, 18 Ves. 429; *Rochford* v. *Hackman*, 10 Eng. L. & Eq. 64; *Piercy* v. *Roberts*, 1 Mylne & K. 4; *Hallett* v. *Thompson*, 5 Paige, 583; *Bryan* v. *Knickerbocker*, 1 Barb. Ch. 409; *Havens* v. *Healy*, 15 Barb. 296; *Collier's Will*, 40 Mo. 287, 325; *Doe* v. *Lea*, 3 Term Rep. 39; *Nicoll* v. *Walworth*, 4 Denio, 385; 4 Kent Com. 310; *Say* v. *Jones*, 3 Brown Par. Cas. 113; Willard Eq. 514, 515; Story Eq. sec. 1216.

STATE NATIONAL BANK *v.* FREEDMEN'S SAVINGS AND TRUST COMPANY.

A certificate of deposit payable to the order of depositor on the return of the certificate was issued by Bank A. to T. D., who could not write. The bank took his mark on its signature book, and wrote a description of him opposite. Shortly afterwards the certificate was stolen from T. D. and presented to Bank B. by a stranger who gave his name as T. D., and said he could not write. Thereupon the cashier of Bank B. endorsed the certificate to his own order with the name of T. D. to which the stranger made his mark, and an employe of Bank B. added his signature as "witness to mark." The cashier then endorsed the certificate and sent it through a correspondent to Bank A., which thereupon paid it, and the money was handed over to the stranger. Thereafter the real T. D. appeared at Bank A., and on discovery of the forgery Bank A. paid him the amount and brought suit against Bank B. to recover the payment on the forged endorsement. *Held*, that Bank A. had a right to rely on the identification of T. D. by Bank B. and could recover.

(*Before* TREAT and KREKEL, JJ.)

Certificate of Deposit.—Forged Indorsement.

On the 7th day of November, 1870, Tim Dunivan deposited in the State National Bank at Keokuk, Iowa, nine hundred dollars, and received therefor a certificate of deposit, of which the following is a copy:—

"$900. STATE NATIONAL BANK, Keokuk, Nov. 7, 1870.

" Tim Dunivan has deposited in this Bank Nine Hundred Dollars, current funds, payable to the order of himself hereon in like funds on the return of this certificate.

" In currency, $900. [No. 4991.]

" G. W. HORTON,
" for Teller."

Tim Dunivan was unable to write, and therefore placed upon the signature book of the bank his mark, the officers of the bank at the same time writing his description opposite the mark on the book. Dunivan went off on the river, and on or about the 20th of November the certificate was stolen from him.

About the 1st of December a man presented the certificate at the counter of the Freedmen's Savings and Trust Company, and asked the cashier to cash it. The cashier refused, on the ground that the person presenting it was a stranger to him, but offered to take it for collection. To this the stranger acceded. The cashier asked him if his name was Tim Dunivan; he replied "yes." He then asked him if he could write his name, and receiving an answer in the negative, the cashier himself wrote the following endorsement: "Pay to the order of W. N. Brant, cashier. Tim $\underset{\text{mark}}{\overset{\text{his}}{\times}}$ Dunivan," the party himself making the cross-mark. The mark was then witnessed by W. P. Brooks, a man who did odd jobs about the bank, as follows: "Witness to mark, W. P. Brooks, St. Louis, Mo." Neither Mr. Brant nor Mr. Brooks was acquainted with the man offering the certificate.

The certificate was then endorsed by Mr. Brant, as follows: "Pay Bower, Barclay & Co., for collection, acct. of W. N. Brant, Cashier," and forwarded to Bower, Barclay & Co. for collection, by whom the certificate was collected and the proceeds remitted to Mr. Brant, and by him paid to the party who had left the certificate for collection. On the 22d of December, Tim Dunivan appeared at the bank in Keo-

kuk, and claimed that the endorsement was a forgery, and that he had never received the money. Thereupon the Keokuk bank paid him the amount and brought this suit against the Freedmen's Savings and Trust Company to recover the amount paid through its correspondent.

The evidence adduced at the trial disclosed the above facts. It further appeared that the cashier of the Keokuk bank, when the certificate was presented from Bower, Barclay & Co., simply looked at the back of it, and remarked that "he guessed it was all right—the endorsers were good." No information was given by plaintiff's officers to Bower, Barclay & Co., or to defendant, as to the description of Tim Dunivan which had been placed upon its books; and there was no evidence as to when the plaintiff gave notice of the forgery, except that the cashier of defendant testified that notice was not given him until some time after the discovery.

Noble and *Hunter*, for the plaintiff.

E. W. Pattison, for the defendant.

TREAT, *District Judge*, charged the jury as follows:—

The case you are trying turns mainly on the question of negligence. The fact that defendant is a corporation is in proof. You have then the plaintiff a corporation and the defendant a corporation.

The rule of law usually is, that where a certificate of deposit is issued by a bank, and it comes back to the bank issuing it with the endorsement of the depositor through the hands of *bona fide* innocent parties, the endorsement being forged, the bank paying the deposit certificate must lose it; for they are presumed to know the signatures of their customers, and the bank issuing the certificate has the means of verifying the signature.

This is a different case. Here was a person who could

not write. The bank gave him the certificate and took his description. The ordinary mode, where a person signs by his mark, is to have him identified, so that a piece of paper coming back to the Keokuk bank through respectable institutions, with the depositor's mark on the back of it witnessed by another party, the bank issuing the certificate would have the right to suppose that the bank sending the certificate had so identified the man making his mark. The witness's signature is proven. Mr. Brooks himself says he signed it. The simple fact, then, that the paper comes back to the bank at Keokuk with a mark witnessed by Mr. Brooks, which means that he knew Mr. Dunivan to be the person who made that mark, is sufficient to justify the Keokuk bank in paying the draft. The jury found a verdict for the plaintiff.

JUDGMENT ACCORDINGLY.

KREKEL, J., concurs.

UNION INSURANCE COMPANY v. SHAW AND OTHERS; EXCELSIOR INSURANCE COMPANY v. SAME DEFENDANTS.

1. Whether sections 9 and 10 of the act of August 30, 1852 (10 Stats. at Large, 61), as to the number of passengers vessels may carry, apply to steamers navigating inland waters, *quære?* [It was held in this court in 1855, that this portion of the act did not apply to Mississippi steamers].
2. The act of July 25, 1866 (14 Stats. at Large, 227), prohibiting ignitible commodities from being "carried on the decks and guards" of passenger steamers, "unless protected by a complete and suitable covering of canvass or other proper material, to prevent ignition from sparks," construed; and it was held that hay in bales piled up in the engine or deck room, back of the engines, and surrounded and protected by a tier of grain in sacks (made of burlaps or jute-cloth) on each side, and two or more tiers on each end, and extending from the floor to the carlings or ceiling, and stripped with plank to make the sacks steady, was a sufficient compliance with this statute.

3. Hay thus placed in the engine or deck room, though the room be enclosed by bulkheads, is upon "the decks or guards" of the steamer within the meaning of the above mentioned act. *Per Treat*, J.

4. In an action against the owner of a steamboat to recover the value of cargo destroyed by fire, on the ground that the loss was occasioned by the carlessness of the officers of the boat, the burden of proof is on the plaintiff to establish the alleged negligence of the officers, and that it caused or contributed to produce the injury.

(*Before* DILLON and KREKEL, JJ.)

Steamboats.—Number of Passengers.—Acts of August 30, 1852, *and July* 25, 1866, *construed.—Carrying Combustible Materials.*

These causes are here by appeal from the decrees of the district court for the eastern district of Missouri.

The respondents were the owners of the steamer Stonewall, which, in proceeding on a voyage from St. Louis to New Orleans, was destroyed by fire on the 27th day of October, 1869. The libellants had insured against fire goods on board of the boat embraced in bills of lading which excepted unavoidable dangers of the river and *fire*. The goods were destroyed by the fire, and the libellants being liable under their policies paid the shippers the value of the goods thus consumed; and claim that thereby they became subrogated to the rights of the persons thus insured.

And these are libels *in personam* by the insurance companies against the owners of the Stonewall to recover the amount thus paid by them to the shippers or owners of the cargo insured; and the ground of recovery as stated in the libels is, that the "loss was occasioned by carelessness and gross negligence of those having charge of the boat." The respondents deny the alleged negligence, and the cause was submitted to the district court upon the testimony produced by the respective parties, and decrees were entered January 15, 1872, dismissing the libels from which the present appeals are prosecuted.

The following opinion was delivered by the *District Judge*.

Treat, J.—"These are libels *in personam* against one of the owners of the steamer Stonewall to recover on a contract of affreightment. The cargo was destroyed by fire (one of the excepted perils) during the voyage. It is alleged in the libel that the loss resulted from the carelessness and negligence of the officers and crew.

"Under the recent decisions of the United States supreme court the burden is on the libellant to prove the alleged negligence, inasmuch as the destruction by fire is undisputed. Libellant contends that inasmuch as the steamer had on board at the time of the loss more than the number of deck passengers named in the inspector's certificate, therefore there was a direct violation of a penal statute, and when to that fact proof is adduced that the fire, when discovered, could probably have been extinguished if the passengers had not in their terror rushed over the officers and crew, preventing thereby the prompt use of the hose attached to the engine, the fact not only of negligence should be considered as fully established, but of negligence contributing to the loss. Whether section 10 of the act of 1852 is applicable to river steamers, would, if the question had not been judicially determined, admit of serious doubt. That section provides that 'in those cases where the number of passengers is limited by the inspector's certificate,' &c., certain penalties shall be incurred if an excess of passengers is taken on board. What are those cases—not as a matter of fact, but of law? Is it when an inspector places in his certificate the number of passengers allowed, or when he does so in accordance with the requirements of law? Section 10 evidently refers to section 9; and it was decided by the United States circuit court here as early as 1855, that the 10th section did not apply to steamers on these inland rivers. So long as that ruling remains undisturbed this court ought to follow it. Subsequent legislation seems to confirm that ruling. The fact that there were more than one hun-

dred deck passengers on board—even if such be the admitted fact, does not of itself show an act of negligence, and the rush of passengers to escape an impending calamity cannot be set down as an act of negligence on the part of the officers and crew contributing to the loss complained of. It seems that the steamer had, in what is termed the engine or deck room, over two hundred bales of hay, piled in two tiers in the centre of that room, two bales deep, transversely along either side of the stanchions in the centre, extending from a point some twenty feet from the doctor forward, past the main hatchway aft. The testimony is not entirely in accord as to the manner in which sacks of oats were piled around the hay. The preponderance is, that about two thousand sacks of oats were so placed 'a-burden' as to make at least two rows in front, more at the aft end, and one on either side; that the oat sacks were piled from the deck up to the carlings or ceiling of the boiler deck above; that when the boat started such was the position of the hay, thus protected by sacks of oats, that no access could be had to the hay without first displacing or removing oat sacks. Some witnesses insist that, while the hay was piled up to or nearly to the carlings, the oats were jammed quite close, and even between the carlings, so that no appreciable or observable opening could be detected. Others say that the oats had settled aft so that a man could crawl over the top, and thus pass to the hay. One fact is clear, that when the fire was first detected, one or more persons did pass over the sacks of oats to the hay through an opening on the top of the sacks, caused by the removal or absence of sacks close to the carlings at that point. The fire was first discovered on the hay at a point not far from the main hatchway and near the hog-chain, around which the hay and oats were piled. The first efforts made to extinguish it were by striking at it with the hats of some deck passengers and then attempting to smother it with bed clothing; at

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the same time an effort was made to pass the hose aft, but the terrified passengers rushed forward with such violence as to run over those in charge of the hose as they were dragging it along the gangway between the oats and a wing-tier of cargo on the larboard side. From the testimony, direct and indirect, the flames spread with great rapidity and violence. The rush of deck passengers to the bow would indicate that that was, apparently, at the moment, the safest part of the steamer. But almost simultaneously with the first alarm of fire, the pilot rounded the vessel to, so that she soon landed on a bar. It being evident then that the boat could not be saved, passengers, officers, and crew looked exclusively to their means of escape with life. Out of the large number on board only a few were saved, the residue perishing either in the flames or in the river. Hence it is obvious that the conflagration was very rapid. In the light of the testimony it does not satisfactorily appear how the fire occurred. One witness swears it was caused by carelessness of a passenger in overturning a lighted candle upon the oat sacks; but that account is hardly consistent even with her own testimony as to the instantaneous spread of the flames, or with the testimony of other witnesses.

"Another hypothesis is, that the fire commenced in the hold forward, and after burning there for some time undetected, as the hatchways were closed, found vent at a pump hole near the hog-chain, or at the aft hatches—that probably the suddenness and fierceness of the flames were caused by the bursting of one or more barrels of whisky in the hold with which the fire below had come in contact. This theory is based mainly on the appearance of the hull, decks, and cargo on subsequent examination. Another hypothesis is, that some of the deck passengers had crawled over the oats and reached the hay for the purpose of sleeping there during the night. The fire occured soon after supper; and it is said that those persons on the hay may have set fire to it

by the careless use of their pipes, or in some other way. This is also conjectured. There is no evidence showing satisfactorily that any one of the three hypotheses is correct. The case stands as a loss by fire, the origin of which is unknown. The act of July 25, 1866, requires 'that cotton, hemp, hay, straw, or other easily ignitible commodity, shall not be carried on the decks or guards of any steamer carrying passengers * * * unless the same shall be protected by a complete and suitable covering of canvass or other proper material to prevent ignition from sparks, under a penalty,' &c. The act of 1852, section 7, provided that 'no loose hemp shall be carried on board of any such vessel; nor shall bailed hemp be carried on the deck or guards thereof, unless the bales are compactly pressed and well covered with bagging or a similar fabric,' &c. The act of 1866, it will be seen, was designed to provide further safeguards against danger from fire, both in the transportation of hemp, and also in the transportation of hay, cotton, straw, &c. Hemp, under the act of 1852, on the deck or guards, was not only to be baled but well covered with bagging; and under the act of 1866, 'protected by a complete and suitable covering of canvas or other proper material to prevent ignition from sparks.' The same precaution is required for hay under the last named act, the phraseology as to covering it being changed in the two acts. It is not important to criticize the change in phraseology as to hemp, but merely looking at the language as applicable to hay, to determine whether the mode adopted in this case meets the requirements of the law.

That hay in the engine room or deck room is within the purview of the act of Congress seems sufficiently clear. Whether stowed there, or on the forecastle deck, or on the guards, it must be protected by complete and suitable covering.

What would be suitable in one position might be unsuit-

able in another. The degree of precaution should correspond with the danger. If these were suits for enforcement of the statutory penalty, such would be the ruling. Now if the hay in the engine room were as completely protected by the sacks of oats as some witnesses testify, the requirements of the statute were met in the light of the testimony of the local inspectors and others. But even if there were a defective covering or protection, yet if such non-compliance with the statute was not at all contributory to the loss, the owners would not be liable.

The burden is on the libellants to prove contributory negligence, and the evidence leaves it in doubt, first, whether the hay was not fully protected as required, and, secondly, whether any supposed act of negligence on the part of the officers or crew contributed in any degree to the loss by fire. It is not meant that if the hay were properly protected at the commencement of the voyage, the owners would be excused, if it was suffered to become uncovered at any time thereafter during the voyage. Their duties continue in that respect throughout the voyage, and it is for them to exercise all needed care and diligence to that end, as well against the disturbance of the covering by deck passengers as against the blowing of a canvass covering from the hay. It is the duty of a common carrier never to relax his watchfulness or care for the safety of the cargo and passengers. In proportion to the recklessness and ignorance of the deck passengers should be the care and diligence of officers and crew.

If the evidence satisfied the court that the loss was caused by defective covering of the hay, by any act of negligence on the part of the officers or crew, or by defective apparatus—or that such defects or neglect contributed to the disaster—then the defendant would be held liable. But in the absence of such satisfactory proof, the libels must be dismissed.

Sharp & Broadhead, Hendershott & Chandler, for the libellants (appellants).

Thos. T. Gantt, Rankin & Hayden, for the respondents.

DILLON, *Circuit Judge*.—Concurring as we do in the main with the views expressed in the opinion of the district judge dismissing the libels, it is not necessary to discuss the questions presented at any considerable length.

Upon the record it is not at all material to determine whether the ninth and tenth sections of the act of August 30, 1852 (10 Stats. at Large, 61), in respect to the number of passengers vessels are permitted to carry, apply to steamers navigating inland rivers. It was determined in this circuit, in 1855, that this portion of the act does not apply to steamboats plying on the Mississippi river. But if it were conceded that it is otherwise, the result in these cases would be the same, for upon examining the evidence we are not satisfied that in fact the boat had more than one hundred deck passengers (that being the number limited in the inspector's certificate) at the time of the disaster. Nor does it appear, on the supposition that there may have been more than one hundred such passengers on board, that this circumstance caused the fire, or that it materially interfered with the efforts to extinguish it, or contributed to the loss of the boat and cargo.

The next question made arises upon the fifth section of the act of July 25, 1866, which provides "that cotton, hemp, *hay*, straw, or other ignitible commodity, shall not be carried on the *decks* or guards of any steamer carrying passengers, unless the same shall be protected by a complete and suitable covering of canvass or other proper material, to prevent ignition from sparks, under a penalty of," etc. (14 Stats. at Large, 227).

The hay was piled up in the engine or deck room, in the

manner stated in the opinion of the district court, reaching from the floor to the carlings or ceiling, and surrounded by sacks of oats and grain, piled up in like manner, and stripped with plank to keep them steady. The hay was not covered with tarpaulins or canvass.

The point is made by the respondents, that the hay being thus placed in the engine or deck room, which was shown to have been *enclosed* by bulkheads, was not upon "the *decks* or guards" of the steamer within the meaning of the section of the act of Congress above mentioned. The district court expressed on this subject a contrary opinion, and its view has much to recommend it as tending to the security of life and property, which was the object of the legislative provision. But without entering into an examination of this question, we place our judgment of affirmance upon the ground which we shall proceed briefly to state.

The evidence satisfies us that the hay, surrounded and protected as it was by a tier of grain in sacks (made of burlaps or jute-cloth), on each side, and two or more tiers of such sacks on each end, was thereby rendered more secure from fire than it would have been if simply covered with canvass. The act of Congress does not prescribe all the modes in which the ignitible commodities shall be protected. The protection must be complete and suitable, whatever mode is adopted. This may be by canvass; but any other mode is sufficient if it affords an equivalent protection and is complete and suitable, that is, adapted to the risk of fire and the degree of exposure. The material out of which these sacks are made is shown not to be easily ignited; it will char, but not burn into a flame when surrounding grain. All the witnesses concur in stating that the hay surrounded and covered by sacks in the manner shown by the testimony was more secure from fire than if it had been completely covered with canvass or tarpaulins.

The evidence leaves the origin and cause of the fire in

uncertainty. It either originated in some unknown manner in the hold and thence extended to the hay through the old pump hole, or it was caused by some deck passengers who had displaced, without the knowledge of the officers, some sacks, and had in this way obtained access to the top of the bales of hay. I confess that the circumstances of the burning rather impress me with the conviction that the fire originated in the hold; but it is shrouded in mystery and wholly unexplained.

The libellants base their right to a recovery wholly upon negligence of the officers of the boat, which, they claim, caused the fire, and consequently the loss of which they complain. The burden of proof is upon them to establish the proposition of fact that it was owing to the negligence of the officers of the boat that the fire was caused; and it is our judgment that the evidence falls very far short of doing this. See *Transportation Co.* v. *Downer*, 11 Wallace, 129; *Railroad Co.* v. *Reeves*, 10 Wallace, 176, 190.

KREKEL, J., concurs.

AFFIRMED.

NOTE.—No appeal to the supreme court was prayed.

The proposition ruled in 1855, upon the act of 1852, mentioned in the opinion, was decided by Mr. Justice *Catron* and District Judge *Wells*.

DAVID C. WRIGHT *v.* SAMUEL E. TAYLOR.

(*Before* TREAT and KREKEL, JJ.)

Ejectment.—Military Bounty Lands.—Special Legislation.—Curative Statutes.—Deeds Defectively Acknowledged.—Construction of Missouri Statutes.

THIS was an action of ejectment to recover possession of certain land in Chariton county, Missouri, forming part of the

tract appropriated for military bounties. Plaintiff claimed under a patent for the land, granted to Nicholas Columbey, dated January 4, 1819, and on the trial offered in evidence said patent, together with a power of attorney by Columbey to William Russell, dated February 23, 1816, a deed from Columbey by said Russell, his attorney, to Moses Russell, dated June 1, 1819, and also subsequent deeds making a chain of title to plaintiff.

The defendant objected to the admission of said power of attorney and the deed made thereunder, as being in violation of the acts of Congress granting bounty lands, and therefore void under them. Objections were also taken to other deeds offered in evidence upon the ground that some of them were imperfectly acknowledged, and that others, being copies, could not be admitted, the statutory requirements governing the admission of copies not having been complied with.

The court sustained the objections as to the power of attorney and the deed made thereunder and rendered judgment for defendant.

Jewett & Bigger, for the plaintiff.

Krum & Decker, for the defendant.

TREAT, *District Judge*.—The court rules the following propositions:—

1. In bestowing the bounty of the government upon its soldiers, Congress had an undoubted right to shape that bounty as it deemed best, either by prescribing conditions or limiting the tenure and quality of the grant.

2. The act of Congress of April 16, 1816, authorizing the designation of lands for military bounties, prohibited the alienation of said lands until after the issue of the patent therefor. *Held*, that a deed made in 1820, by the attorney of a patentee, under a power of attorney executed in

February, 1816, the patent not having issued till 1819, is void *ab initio*, as being within the prohibition of the act.

3. The federal court will follow the decision of the state supreme court as to the admissibility in evidence of certified copies of deeds without accounting for the absence of the originals and as to the various curative acts concerning deeds improperly or defectively acknowledged, and as to the force and effect of the recording acts, whether those decisions are in accord with what are deemed sound rules of interpretation or otherwise.

4. The provision of the Missouri constitution of 1865 forbidding the enactment of special laws giving effect to informal or invalid wills or deeds, etc., does not prevent the enactment of general curative statutes upon the subjects named, nor upon any of the other classes of subjects enumerated in that clause of the constitution; such acts being *general* in the constitutional sense, since they apply to a *class* and not to *individual* cases; hence, the exceptional legislation as to military bounty lands in Missouri is not within the provision of the Missouri constitution.

5. Section 38, chap. 109, of the revised statutes of Missouri, pertaining to the admissibility in evidence of certified copies of deeds for military bounty lands, is not repealed by the act of Feb. 27, 1868 (Session acts 1868, p. 51), nor is the common law mode of proving the execution of deeds thereby abrogated; hence, a deed for such lands can be received in evidence where its execution is proved according to the common law mode, in the same manner as any other deed not acknowledged or recorded properly, and it will be valid between the parties and those having actual notice and mere trespassers.

6. A certified copy from the recorder's office of such deed, when the original has been recorded and acknowledged under section 35, chap. 109, revised statutes of Missouri, 1865, must be received in evidence upon proof of the

loss or destruction of the original; and if duly acknowledged according to the laws of Missouri, a certified copy is to be received on the same terms as other deeds with valid acknowledgments.

7. A deed improperly acknowledged in New York in 1820, according to the laws both of New York and Missouri at that time, and recorded in Missouri in 1822, is not such a deed as sections 35 *et seq.* of chap. 109 of the revised statutes of 1865, affects; and a curative act passed in New York in 1824 to operate on such imperfect acknowledgments in that state cannot act extra-territorially and work curatively upon a deed to Missouri lands.

JUDGMENT FOR DEFENDANT.

NOTE.—The elaborate opinion of TREAT, J. in support of the foregoing propositions, will be found published at length in the St. Louis *Law News*, October 11, 1872, p. 32.

As to curative acts and defective certificates of acknowledgment of deeds: *Randall* v. *Kreiger*, *post*; *Morton* v. *Smith*, *post*.

HENING & PEARCE, Surviving Partners, etc., *v.* THE UNITED STATES INSURANCE COMPANY.

1. Declaration construed, and first count held to set forth a *parol contract* by an insurance company to insure the specific cotton sued for.
2. The *parol contract of insurance* set up in the declaration held to be valid, and not to prohibited by the charter of the defendant, or by the statutes of Missouri, the provisions of which in this respect are considered.
3. The decision of the supreme court of the state to the contrary held not to be binding upon this court. (TREAT, J. dissenting on this point.)
4. Where by the terms of a *written policy* of marine insurance the city of St. Louis was to be one of the *termini* of all risks it embraced, *it*

cannot be extended to other and different risks by an averment that the policy was so "understood, construed, and intended by the parties;" but there may be a *new parol contract* to insure such different risks, and this new contract may refer for part of its terms to a preexisting written contract of a similar character between the parties.

(*Before* DILLON, TREAT, and KREKEL, JJ.)

Marine Policy.—Construction.—Parol Contracts of Insurance.—Charter of Defendant and Statutes of Missouri Construed.

IN this cause an amended declaration was filed to the October term, 1871. The defendant filed pleas of non-assumpsit, and the statute of limitations of five years. To this there was a replication, confessing and avoiding, and defendant demurred. The court, on argument, overruled the demurrer, and the defendant rejoined, tendering an issue. Plaintiff joined issue. Two additional counts were filed to the April term. To these defendant demurred generally. At the argument, it was suggested by the court that, in order to accomplish anything effectual by this preliminary discussion, it would be desirable that the policy declared on in the second and third counts, together with the charter of the defendant, should be before the court. Thereupon, it was agreed to withdraw the pleas to the first count, and to file a general demurrer to the whole declaration; the court, in considering the matters of law presented, to have before it the policy (including the books which make part of it) and the defendant's charter.

The declaration as amended contains three counts; and the demurrer to each of which raises the questions to be decided.

All of the counts refer to a *written policy* issued by the defendant to Hening & Woodruff, June 1, 1855.

The words of the policy, so far as the same (exclusive of the books annexed to it) are illustrative of the points under consideration, are as follows:

"The United States Insurance Company, of St. Louis, Missouri, do make insurance, and cause to be insured, lost or not lost, Messrs. Hening & Woodruff, or whom it may concern, on all shipments made to them, including ten per cent additional to invoice, at and from any ports and places, to and from St. Louis, said shipments to be covered by this policy, on good steamboats, canal boats, and steam and sail vessels, and also by railroad, and the same to be reported to the company for endorsement on the policy as soon as known, and each package subject to its average, this policy will also cover all shipments made by said assured, or to their address at St. Louis, from the Upper Mississippi, Illinois, or Missouri rivers; said shipments from the Missouri river to be made on good steamboats, and from the Upper Mississippi and Illinois rivers, to be made on good steam or canal boats or barges (such as have the inspector's certificate) towed by a steam vessel. Goods and produce from the upper rivers to be entered, and in case of loss, to be paid for at the cash value, in St. Louis, at time of such loss. Such shipments to be entered in a book annexed to this policy, and hereby made a part of it. It is understood that goods and produce covered by this policy shall be for the one-half ($\frac{1}{2}$) of said shipments, the other half being insured elsewhere, and to be taken at the usual rates, premium to be settled for at the end of each and every month. Amounts under $50, in cash, when over $50, by a note at four months; in either case a discount of twenty-five per cent to be made."

The defendant was chartered by the state of Missouri, February 24, 1855. The *charter provides*: —

"The company hereby established shall have power to make insurance on life or lives, and to grant annuities, and to make insurance for the benefit of survivors; *but all the conditions of policies issued by said company shall be printed or written on the face thereof.*"—*Sec.* 3.

Section four declares: "The company hereby created

shall have full power and authority to insure all kinds of property against loss or damage by fire, to make all kinds of insurance against loss on property of every kind, in course of transportation, whether happening *on land or water*, to make such other insurance as they may deem proper and expedient, and to re-insure themselves against loss or any risk which they may have taken, and generally to do and perform all necessary matters and things connected with these objects or either of them."

Section five fixed the time and mode of election of thirteen directors.

"SEC. 6. The directors regularly chosen by the stockholders of the company, shall, as soon as may be after every annual election, choose out of their body one person to act as president and one as vice-president. The first named shall preside at all meetings of the directors; in case of his absence or death, the vice-president shall perform his duties; either of whom, with the secretary or actuary, *shall sign the policies or contracts made by order of the board of directors;* which contracts shall be binding with or without the seal of said corporation, and shall do and perform such other acts and things as may be prescribed in the company's by-laws."

The *General Statutes* of Missouri upon the subject of corporations in force at the time of the charter of the defendant, declares that all charters thereafter granted shall, unless otherwise expressed, be subject to the provisions of the general law respecting corporations; and section 8, p. 232 of revised code of 1845, declares that "*Parol contracts* may be binding on aggregate corporations if made by an agent duly authorized by a corporate vote, or under the general regulations of the corporation; and *contracts may be implied* on the part of such corporations, from their corporate acts, or those of an agent whose powers are of a general character."

The defendant was not released from, but, by implication, subjected to, this provision of the general law.

The first count in the declaration, after setting forth the original policy of June 1, 1855, and certain subsequent *verbal* modifications thereof, its continued existence in force, and the acts of the parties under it, alleges as follows: "And on the 25th day of March, in the year 1864, the said Hening & Woodruff proposed to the said defendant that all cotton on any boat, for or on account of William Butler & Co., from Red river or its tributaries, or the Yazoo river and its tributaries, or any tributary of the Mississippi, should be considered, treated, and regarded as insured in and by the said open policy, dated, as aforesaid, June 1, 1855, and modified, as hereinbefore stated, by verbal agreement, and the said defendant, on or about the first day of April, 1864, *accepted the said proposal, and agreed verbally* with the said Hening & Woodruff that all the cotton of William Butler & Co. on any boat from the Red river or its tributaries, or the Yazoo river or its tributaries, or from any tributary of the Mississippi, should be entered in the book annexed to the said open policy of the said Hening & Woodruff; that the said Hening & Woodruff should pay in respect thereof the usual rates of premium, and that the same should be taken, treated and regarded by the defendant as insured for the said Hening & Woodruff, on account of whom it might concern, according to the terms and conditions of the said open policy, and that the loss thereof, if any, should be paid by said defendant to the said Hening & Woodruff, for whom it might concern, and that the payment of the premiums thereon, and the settlement of the accounts in respect thereof, should be made monthly by said Hening & Woodruff, as provided in and by the terms of said open policy, and after the said agreement was so as aforesaid made, the said Hening & Woodruff, and the said defendant, carried the same into execution by causing all the cotton of the said William Butler & Co., on any boat from the Red river or its tributaries, or the Yazoo river, or its tributaries, or

from any tributary of the Mississippi river, to be entered and endorsed upon and in the said book annexed to said open policy of the said Hening & Woodruff with the said defendant, and the said Hening & Woodruff did pay to the said defendant, in respect thereof, the usual and customary rates of premium, and the defendant, fully understanding the said agreement so verbally made, and intending to carry the same into effect, did receive the said premiums from said Hening & Woodruff down to the accruing of the loss and the doing of the wrong and injury herein presently stated. And on the ninth day of June, in the year 1864, the said William Butler & Co. did ship, on the good steamboat "Progress," from the mouth of the Red river, in the state of Louisiana, then bound for the port of Cairo, in the state of Illinois, seven hundred (700) bales of cotton, of great value, to-wit: of the value of two hundred and eighty thousand dollars ($280,000), to be delivered at the port of Cairo aforesaid, to the said William Butler & Co., for the mere purpose of complying with the regulations of the treasury of the United States in that behalf, and immediately thereafter to be forwarded and consigned to the said Woodruff & Co., at the city of New York. That the said Hening & Woodruff were then and there interested in the said cotton, and were, in fact, the legal owners thereof, as having advanced thereon the sum of fifty thousand dollars to the said William Butler & Co. for the purchase thereof, to be repaid to them out of the first proceeds of the sale of the said cotton by the said Hening & Woodruff at New York city, the said William Butler & Co. agreeing at the time of said advance to forward and consign the said cotton to the said Woodruff & Co. at New York city, to be by them sold on commission on account of said Hening & Woodruff; and as soon as the said cotton was so placed on board the said steamboat "Progress," a bill of lading was given therefor to the said William Butler & Co., on which

bill of lading the said Hening & Woodruff immediately caused a memorandum in writing to be made, that the same was insured in and by the open policy of the said Hening & Woodruff, meaning the open policy aforesaid of the said Hening & Woodruff with the said defendant; and immediately after the said shipment and the making of the said bill of lading, and the making thereon of the said memorandum, the said defendant had due and immediate notice of the making of the said memorandum and the shipment, to-wit: at St. Louis aforesaid; and the said Hening & Woodruff caused the said shipment to be immediately noted and entered upon the said book annexed to the said open policy of the said Hening & Woodruff with the said defendant, to-wit: on the 9th of June, 1864; and the said Hening & Woodruff were at all times ready on said day, and thereafter, to pay to the said defendant the customary and usual rates of premium for insurance thereon, according to the terms of said verbal agreement with the said defendant by the said Hening & Woodruff made on or about the first day of April, 1864, and the conditions of said open policy. And afterwards, and while the said steamboat was ascending the river Mississippi, as aforesaid, on her way from the mouth of the Red river to the port of Cairo, in the state of Illinois, and while the said steamboat was in a part of the Mississippi called Dead Man's Bend, said steamboat took fire and was destroyed, together with all of the said cotton so shipped on board of her by the said William Butler & Co., by means of the said fire, and so the said cotton became burnt, and wholly, utterly, and totally lost by the said fire, which was one of the perils against which the said defendant promised to insure the said Hening & Woodruff in respect of said cotton, of all which the said defendant had due notice, to-wit: at St. Louis aforesaid, on the day of the happening of said fire, which was on the ninth (9th) day of June, 1864, and by reason thereof the said

defendant became liable to pay to the said Hening & Woodruff the value of said cotton, to-wit: the sum of two hundred and eighty thousand dollars at the end of the month of June, 1864, less the usual rates of premium for insuring the same, which rates of premium were one per cent of the value thereof. And being so liable the said defendant afterwards, to-wit: on the day and year last aforesaid, at the district aforesaid, undertook and faithfully promised to pay the said sum of money to said Hening & Woodruff, on the last day of June, 1864," etc.

The second count is like the first, except that it alleges that the subsequent modifications of the written policy of June 1, 1855, were made by *memoranda in writing* by the defendant, and annexed to the said open policy, and that the defendant, by such a memorandum, *in writing*, insured the said cotton shipped as aforesaid by Butler & Co. on the 9th day of June, 1864, on the steamer "Progress," from the mouth of Red river to the port of Cairo.

The third count, after setting forth the policy of June 1, 1855, alleges, *inter alia*, as follows: "That after the making of said contract of insurance, to-wit: on the first day of September, A. D. 1862, by a memorandum in writing, indorsed and written in and upon said policy book, a part of said contract of insurance, as hereinbefore stated, and duly assented and agreed to by said Hening & Woodruff and said defendant, it was understood and agreed that the goods and produce covered by said policy should be for the full amount of said shipments, instead of the one-half thereof as theretofore; and from and after the date last aforesaid, defendant, by virtue and in pursuance of said contract or policy of insurance as understood and construed and intended to be understood and construed by and between said Hening & Woodruff and said defendant, did insure and cause to be insured all shipments made by said Hening & Woodruff, or by any other parties in which said Hening &

Woodruff had an interest, at and from any and all ports and places to and from any and all ports and places upon the Mississippi river and its tributaries and other navigable waters, irrespective of the place of shipment or the point of destination, which shipments were from time to time duly entered in said policy book, and settled for as afore-stated, for a long term of years."

The said shipment of cotton by Butler & Co. on the 9th day of June, 1864, on the "Progress," from Red river to Cairo, is then alleged, and also the value thereof and the plaintiff's ownership or interest therein as before; and it is also averred that "immediately upon the delivery of said cotton to said steamboat Progress, and upon the day and year last aforesaid, the master or agent thereof did execute and deliver to said Butler & Co. a bill of lading therefor in the usual form, and said Butler & Co. delivered the same to said Hening & Woodruff, who caused to be indorsed thereon, in the usual course and manner of business between said Hening & Woodruff and said defendant, the words, in effect, as follows, to-wit: 'Insured in Hening & Woodruff's open policy,' meaning the policy aforesaid, and in the usual time, to-wit: on the fifteenth day of June, eighteen hundred and sixty-four, the said shipment was duly indorsed upon said policy of insurance, and entered in said policy book, whereby the same became and was covered by said policy; of all which defendant was duly notified, and said Hening & Woodruff, at the end of said month of June, eighteen hundred and sixty-four, and at all times, were and have been ready and willing, and offered to pay the premium reserved and provided for in said policy, and afterwards, to-wit: on the ninth day of June, 1864, and while said steamboat Progress was duly prosecuting her voyage on the Mississippi river aforesaid, from the mouth of Red river to Cairo aforesaid, and at a point on said river called 'Dead Man's Bend,' the said steamboat took fire, and both

the said boat and the said seven hundred bales of cotton were consumed and totally destroyed; and the said cotton became and was wholly and totally destroyed by the said fire, which was one of the perils against which defendant, by its said open policy, did assure the said Hening & Woodruff, of all which said defendant afterwards, to-wit: on said ninth day of June, A. D. 1864, had due notice, by reason whereof defendant became and was liable to pay to said Hening & Woodruff the value of said cotton," &c.

Thos. T. Gantt and *George P. Strong*, for the plaintiff.

Glover & Shepley, and *Sharp & Broadhead*, for the defendant.

DILLON, *Circuit Judge.*—Upon consideration, we decide:

1. That the *first* count of the declaration sets forth a verbal contract by the defendant to insure this specific cotton; that in the absence of any restraining provisions in the charter of the defendant, or in the laws of the state applicable to the defendant, a parol contract of insurance is valid; that the laws of the state respecting corporations, so far from prohibiting, allow parol contracts to be made, and recognize the validity of implied contracts by corporations (Stat. 1845, p. 232, sec. 8); that the charter of the defendant, construed in the light of the general law, does not disable it from making a binding contract of insurance without writing. The charter directs that "all the conditions of policies issued by the company shall be printed or written on the face thereof," and that certain named officers "shall sign the policies or contracts made by order of the board of directors;" but these provisions, especially when viewed in connection with the general law of the state, cannot be held to prevent the company from making oral contracts of insurance, nor from being held liable upon implied contracts

of insurance in accordance with the general and established principles of law.

2. If the decision of the supreme court of Missouri, when this cause was before it (47 Mo. R. 425), is to be considered as holding an opposite view, it is not conclusive upon this court, although entitled to great respect and consideration.

The contract alleged is one relating to general commercial law, and in such cases the federal courts, when their power is judicially invoked, must determine for themselves, both as to the power to make the contract and its true construction: *Butz* v. *Muscatine*, 8 Wallace, 584; *Bank* v. *Kelley*, 1 Black, 436, 443; *Gelpcke* v. *Dubuque*, 1 Wallace, 175, 205; *Leffingwell* v. *Warren*, 2 Black, 599; *King* v. *Wilson*, 1 Dillon, 555.

In this view, as to the effect of the decision of the state court, KREKEL, J., concurs, but TREAT, J., differs, he holding that it is conclusive upon the federal court as to the power of the corporation to make the contract.

The demurrer to the first count is therefore overruled.

3. The *second* count alleges the contract to insure this specific cotton to be in writing. And if (as the demurrer admits) the averments thereof are true, the plaintiffs have a cause of action. We do not now determine whether the entries appearing on the books annexed to the open policy establish the truth of the averment that there was such a contract in writing as this count sets forth. The statements in this count as to the legal effect of the written policy of June 1, 1855, as to termini of shipments, are, in our opinion, erroneous, for the reasons stated in the ruling upon the third count of the declaration.

4. In substance, the *third* count is one upon the *original policy* of June 1, 1855, which, it is alleged, covered by its own terms and effect ("as understood, construed, and intended to be understood and construed," by the parties), this shipment of cotton in 1864 by Butler & Co. to them-

selves, from the mouth of Red river to Cairo. The allegation is that the original policy, when properly construed as intended, extends to and covers by its own force, effect, and operation, "all shipments made by said Hening & Woodruff, or by any other parties, in which said Hening & Woodruff had an interest, at and from all ports and places, and to and from all ports and places, upon the Mississippi river, irrespective of the place of shipment or the point of destination."

To this construction of the policy of June 1, 1855, we cannot give our sanction. It cannot mean one thing in 1864 and another in 1855. Where the terms of a policy are not clear, we may resort to usage, and the course of dealing under it the better to enable us to ascertain what the parties meant by the use of such terms, but no further. By its terms we think it plain that St. Louis was to be one of the *termini* of all risks which it was intended to embrace, and that it cannot be held of its own unaided force and effect to extend to a shipment of cotton in the name of other parties from a place on the Mississippi river to the port of Cairo, although Hening & Woodruff may have been interested in such shipment.

In this view of the third count, the demurrer thereto is well taken, and must be sustained.

Of course, it is not intended to deny that a written contract may be modified, and either enlarged or restricted by a subsequent valid parol agreement. But if any such parol agreement was subsequently made whereby a risk was insured which was not embraced in the original contract, the rights of the plaintiff arise under such subsequent parol contract, and must be determined by it. It is in this event a *new* contract, and it is a *parol* contract, although it may refer for part of its terms to another contract in writing of a similar character existing between the parties; but such

reference does not make the new contract a written contract, nor does it alter the meaning, force, or operation of the written contract.

JUDGMENT ACCORDINGLY.

NOTE.—Subsequently, at the September term, 1872, the cause was tried before Mr. Justice MILLER, and TREAT, J. and a jury, which rendered a verdict for the plaintiff for $178,280. To a proposition to reopen the questions of law decided on demurrer in the foregoing opinion of the circuit judge, Mr. Justice MILLER is reported as saying, that such a course is not only against the settled practice of the court (*Appleton* v. *Smith*, 1 Dillon, 202), but if the propositions ruled heretofore were now open, he sees no reason to doubt, after what has been said by counsel, that they were ruled correctly.

ARCHIE WOODS, *et al.* v. ROBERT A. BUCKEWELL, *et al.*

1. The district court has large discretionary powers in matters of bankruptcy, and the circuit court will not interfere with the exercise of such powers, and set aside the appointment by the district court of an assignee, in a case where it is only claimed that the district court erred in holding that no election had been made by the creditors, there being no allegation against the fitness of the person appointed.
2. Nature of the jurisdiction conferred upon the circuit courts by the *second section* of the bankrupt act considered by Mr. Justice MILLER.

(*Before Mr. Justice* MILLER.)

Petition for Review of Appointment of Assignee in Bankruptcy.

O'FALLON & HATCH were adjudged bankrupts in the United States district court for the eastern district of Missouri, on the petition of Archie Woods, *et al.*, creditors of said bankrupts. The usual warrant in bankruptcy was issued and a meeting of the creditors called thereunder for the purpose of electing an assignee. At that meeting there was a close contest

among the creditors as to the person to be elected assignee. The register reported to the district court that twelve votes, representing debts amounting to $39,192.78, were cast for Leonard Matthews as assignee, and eleven votes, representing $33,456.43, were cast for Henry Overstolz, the other candidate for the assigneeship, and certified that Leonard Matthews had been elected. Several other claims, however, had been withdrawn, rejected, or postponed, and questions arose concerning the action of the register or of the claimants themselves thereon. The facts relating to such claims were also reported by the register to the district court. Exceptions to the register's report were filed by Robert A. Buckewell and other creditors, and upon a hearing thereof the district court adjudged that no election of assignee had been made by the creditors, and appointed Robert K. Woods as assignee.

The petitioning creditors in the original bankruptcy proceeding brought the present petition in the circuit court against those creditors who excepted to Mr. Matthews' election, alleging that Mr. Matthews had been duly elected, and asking the circuit court to review and reverse the action of the district court, to annul the appointment of Mr. Woods, and to declare Mr. Matthews duly elected.

Hendershott and *Chandler*, for the petitioners.

Basil Duke, and *Dryden & Dryden*, for the respondents.

Mr. Justice Miller.—This is a petition for review of the proceedings at the election of the asignee of the bankrupt's estate. The election was a close one. There were twenty-three or twenty-four votes cast, and the register decided in favor of Leonard Matthews as the assignee, and against Henry Overstolz, the other candidate for the assigneeship. The proceedings at the meeting of creditors were brought to the attention of the district court, which held that there had

been no election by the creditors, and appointed Robert K. Woods as assignee. It is not claimed in the petition that any objection exists against Mr. Woods, but the quarrel seems to be among the creditors themselves. This court is asked to examine the details of the election, to count the votes, and to go into the qualifications of the voters. Now, I do not consider that the bankrupt act contemplates the bringing of this class of cases before the circuit court for review. The second section of the act provides "that the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except where special provision is otherwise made, may, upon bill, petition, or any other proper process, of any party aggrieved, hear and determine the case *in a court of equity.*" To decide upon the legality of the votes or the qualifications of creditors involves no principle of equity, unless fraud in the election is alleged. The district courts are vested with large discretionary powers, in reference to the appointment and approval of assignees. Section 13 of the act contains the following provisions: "The creditors shall at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees. * * * * All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees or order a new election." The discretionary power thus vested in the district court could scarcely

be in stronger terms. Assignees and registers are but officers of the court and subject to its orders. The chief difficulty complained of concerning district judges (and in saying this I am not to be understood as referring to Judge TREAT) in connection with the bankrupt law has been that they do not hold a strong enough hand over the officers of the court, and see that they are prompt and efficient in the discharge of their duties. Such being the case, I shall not be the first to interfere with the discretionary powers of the district court in regard to the appointment and control of its officers. The petition is dismissed.

PETITION DISMISSED.

GEORGE R. MACKAY v. ALTON R. EASTON.

1. A patent issued in 1827, pursuant to a New Madrid certificate or warrant, under which both parties claimed title, and pursuant to the requirements of acts of Congress is valid, and possession by the defendant under the patent for ten years was held to entitle him to a verdict in an ejectment against him.
2. The case distinguished from *Easton* v. *Salisbury* (23 Mo. 100; S. C. in error, 23 How. 426), where the patent of 1827 was decided to be void.
3. Acts of Congress pertaining to the New Madrid locations referred to by TREAT, J.

(*Before* MILLER and TREAT, JJ.)

New Madrid Locations.—Ejectment.—Validity of Patent.

THIS was an action of ejectment to recover possession of certain land situated in the city of St. Louis, forming part of a tract which was located under New Madrid certificate No. 159, dated November 16, 1816, in favor of James Smith, upon which a patent was issued May 28, 1827, to said Smith or his legal representatives. Smith, on July 9, 1811, had had confirmed to him by the commissioners for the adjust-

ment of titles to land in the territory of Missouri, certain lots of land in New Madrid county, which lots were afterwards, and while still owned by him, materially injured by earthquakes; whereupon, by virtue of the act of Congress approved February 17, 1815, making provisions for the relief of sufferers by the New Madrid earthquakes, the certificate aforesaid was issued in the name of James Smith, and upon this certificate the patent above mentioned was issued to Smith or his legal representatives. Both parties in this action claimed under the James Smith in whose name the certificate of location was issued. Plaintiff claiming under a title bond by Smith to Andrew P. Gillespie, dated April 14, 1816, and under a deed by Smith to Gillespie, executed of date March 5, 1819, pursuant to the covenant to convey contained in such bond. Gillespie, in 1846, conveyed to William W. Gitt, who conveyed to plaintiff. Defendant claimed under a deed dated October 22, 1816, by James Smith to Rufus Easton, who, on June, 28, 1826, conveyed to William Russell, from whom the title passed through various intermediate holders to defendant.

The case was tried before a jury, Mr. Justice MILLER and Judge TREAT presiding. The court, through TREAT, J., instructed the jury that the patent of 1827, above referred to, was valid, and that the only point for their determination was whether the defendant had been in possession, under the patent, for ten years prior to the bringing of the suit, and that if they were satisfied that possession for that period had been proved, they would find for the defendant. The jury accordingly returned a verdict for defendant. It may be observed that the same patent has been decided to be void in the case of *Easton* v. *Salisbury*, tried in the St. Louis court of common pleas, in 1855, before his honor, Judge TREAT (one of the judges who sat on the trial of the present case), a decision which was first affirmed by the supreme court of Missouri (23 Mo. 100), and afterwards, on writ of

error, by the supreme court of the United States (21 Howard, 426). Conflicting as the decision in *Easton* v. *Salisbury* and that in the present case may appear, such conflict arises, not from a different interpretation of the law, but from the fact that in the former case there was wanting a link which in the present case has been supplied. In order rightly to understand the precise nature of this link, and the ruling of the court, an acquaintance with the acts of Congress pertaining to the New Madrid locations is necessary. This was stated by Treat, J., as follows: "By the act of Congress above referred to, approved February 17, 1815, any persons owning lands in New Madrid county, and whose lands had been materially injured by earthquakes, were authorized, subject to the limitations and restrictions therein mentioned, to 'locate the like quantity of land on any of the public lands in the territory of Missouri, the sale of which was then authorized by law.' This act made it the duty of the recorder of land titles for that territory, upon proof of the title of any such person to the benefits of the act, to issue a certificate that such person was so entitled. Upon such certificate being issued, location was to be made, on claimant's application, by the deputy surveyor of the territory, who was required to survey the same and return a plat of such location to the recorder, with a notice designating tract located, etc., which notice and plat were to be recorded in said recorder's office, whose duty it then was to transmit to the commissioner of the general land office a report of the claims allowed and the locations made, delivering to the party a certificate of the circumstances and of his being entitled to a patent. This certificate was required to be filed with the recorder within twelve months from its date, and thereupon the recorder was to issue another certificate, which, being transmitted to said commissioner, entitled the party to a patent.

"Following this act and curative thereof in respect to the

mode of survey, was another act, approved April 26, 1822, which, *inter alia*, provided that all warrants issued under the act of 1815, should be located within one year after the passage of the amendatory act, that is, within one year after April 26, 1822, otherwise they should be null and void.

"Now, in the case of *Easton* v. *Salisbury*, where the controversy was between the title under the same New Madrid certificate No. 159, and a Spanish concession, but in which the validity of the patent to James Smith of May 28, 1827, above mentioned, was involved, that patent was successively adjudged by the three courts through which the case passed to be not only voidable, but absolutely void, *ab initio*, the warrant, according to the proofs in that case, *not having been located within one year from April* 26, 1822, as required by the act of that date. But in the present case the proofs showed that the warrant was located on February 26, 1823, thus establishing the fact of the location within the year limited by the statute of 1822, and thereby supplying the link that was missing in *Easton* v. *Salisbury*. This patent having been thus issued pursuant to the certificate or warrant under which both parties claimed title, and pursuant to the terms and limitations of the acts of Congress, was therefore valid, and possession by the defendant, under the patent, for ten years before suit was brought, having been proved, it only remained for the jury to find for the defendant."

JUDGMENT ACCORDINGLY.

D. T. Jewett and *John F. Darby* for the plaintiff.

Charles Gibson, *E. Casselbury*, and *William B. Thompson*, for the defendant.

ADLER v. NEWCOMB, *et. al.*

Suits on Marshal's Bond.—Jurisdiction.—Judgment.

TREAT, J.—1. The federal courts have jurisdiction in suits by individuals upon a marshal's bond, even where all the parties to the suit are citizens of the same state, the reason being that the act of Congress of April 10, 1806, which gives the right to a party injured by breach of the bond to sue thereon in his own name, puts such party in the place of the United States, and does not take from the federal courts the jurisdiction they had before the act was passed, when suit had to be brought in the name of the United States. 2 Stats. at Large, 372.

2. In a suit upon a marshal's bond, the petition should ask judgment for the damages sustained, and not for the whole penalty of the bond.

Nathan Frank, for the plaintiff.

Dryden & Dryden, for the defendant.

COX v. WILDER, *et al.*

1. As against the assignee in bankruptcy, the wife is not barred or estopped to claim *dower*, by reason of her having joined her husband in a deed which is fraudulent as to creditors, and which has for this reason been set aside at the instance of the assignee.
2. A similar principle was applied under the statute of Missouri to the *homestead exemption* right, which, as against the assignee in bankruptcy, was held not to be forfeited by the making of a fraudulent conveyance, which was set aside at the instance of the assignee.

(*Before* DILLON and KREKEL, JJ.)

Bankrupt Act.—Dower.—Homestead Exemption.—Fraudulent Conveyance.

THIS is an appeal from a decree of the district court for the eastern district of Missouri. Cox is the assignee in

bankruptcy of Sauer. Sauer and wife made a conveyance of the farm of Sauer, on which he and his family resided, to Wilder, within six months of the bankruptcy. The district court found that the conveyance was fraudulent as to creditors, and decreed that all of the rights of Wilder, and of Sauer, and of his wife (who were defendants to the bill), be divested out of the defendants, and be vested in the plaintiff as assignee, free and discharged of the homestead claim of Joseph E. (the husband), and the dower right of Mary E. (the wife); from which decree the defendants appeal.

C. C. Whittlesey, for the assignee.

Dryden & Dryden, for the defendants.

DILLON, *Circuit Judge.*—The deed to Wilder was executed by Sauer and wife, and was absolute in form and duly acknowledged. It was intended to secure advances to be made, but which were, in fact, never made, and we agree with his honor below, that, whether regarded as a sale to Wilder, or as security for advances which upon a contingency he promised to make, it was intended to delay creditors, and was, therefore, as to them, fraudulent and void. Not having been recorded, the deed was, after the bankruptcy, surrendered by Wilder to Sauer, and destroyed. The only question in the case is, whether the assignee is entitled to the land free of the dower and homestead rights.

The grounds of the decree below were very fully and ably stated by the district judge in his opinion on a demurrer to the bill, and which is reported in the *National Bankruptcy Register* (Vol. V. p. 443).

We are unable, however, to concur in the conclusion to which he has arrived respecting the dower. It is a peculiar and favored right; so much favored, indeed, that, according to Lord Bacon, it is "the common by-word in the law, that the law favoreth three things: first, life; second, liberty;

third, dower." Dower can only be relinquished in this state (Missouri) by the wife joining with the husband in a deed of the land, acknowledged and certified as required by the statute. (Rev. Stat. 1865, p. 444, sec. 2.) It cannot be released to a stranger. The wife could not have relinquished it by herself to Wilder. It cannot exist as a separate right in him or his grantee, dissociated, so to speak, from the interest or estate of the husband. As against the grantee, she is estopped by her deed to claim dower, but the estoppel cannot operate in favor of or be claimed by a stranger, or third person, under whom the complainant does not derive or claim title: *Robinson* v. *Bates*, 3 Met. (Mass.) 40; *Paxley* v. *Bennett*, 11 Mass. 298; *Morton* v. *Noble*, Sup. Ct. Ill. 4 Ch. Legal News, 157, and cases cited by SCOTT, J.; *Summer* v. *Babb*, 13 Ill. 483; 1 Wash. Real Prop. 284, pl. 16; *Sears* v. *Hanks*, 11 Ohio St. 298.

We solve the question here presented as to dower, when we determine under whom the assignee claims and to whose rights he succeeds. The bankrupt act, among other things, invests him with the right or title to "all the property conveyed by the bankrupt in fraud of his creditors:" Sec. 14.

He claims not under, but adversely, to the deed of Wilder. He succeeds to all the interests of the bankrupt, and represents his creditors so far as to enable him to attack conveyances made by the bankrupt in fraud of their rights. He claims that the deed is void as to creditors, and on this ground alone attacks it, and upon this ground alone has he any right to the property. He says it is void as to creditors because fraudulent, and for this reason asks to be invested with the title which it fraudulently conveyed. He cannot claim *under* it, and must claim *against* it. When it is decreed to be fraudulent and void at his instance, how can *he* set it up to defeat the right of the wife to dower? Such a position involves this inconsistency, viz: that it asks that

the same instrument be held void as to creditors, and then in their favor held valid as to the wife. We concur in opinion with those courts which hold, as in the cases above cited, that the wife is not, under such circumstances, barred of her dower.

When we consider the intimate and confidential relations between husband and wife; the control and influence of the former over the latter in matters of business; the public policy in which the right of dower has its origin and support in the law, namely, a provision for the widow; and that if the fraudulent conveyance had not been made, the dower right would have been beyond the reach of the creditors or the assignee, we find it difficult to resist the conviction that, as between the wife and the assignee, the equity as to the dower right is with her, and that to deprive her of it, is, in substance and effect, to punish her for the intended, but by the decree the court makes, the ineffectual, fraud of the husband.

Similar considerations, in my judgment, apply to the *homestead right*, although here I have the misfortune to differ not only with his honor below, but with my associate on this appeal. Exempt property does not pass to the assignee (section 14), and the bankrupt law exempts, *inter alia*, from the operation of the assignment, all such property as was exempt from levy and sale, upon execution by the law of the state, to an amount not exceeding that allowed by the state exemption laws in force in the year 1864 (Section 14).

By the act of March 23, 1863 (Laws of Missouri, 1863, p. 22), it is provided that "there shall be exempt from sale under execution (or other process), when owned by the head of a family, or wife, who shall be a *bona fide* resident of the state, any of his or her real estate, not exceeding (one hundred and sixty acres, if farming land, or one lot in town or city) in value one thousand dollars at the date of such exemption, to be held and enjoyed by such party as a homestead."

9th. "Where the real estate owned by any head of a family is of greater value than the amount allowed as the value of a homestead to be exempt from sale under the provisions of this act, and is not susceptible of division, such real estate may be sold, and the officer shall pay over to the defendant in such execution the amount or value of a homestead to be exempt under the provisions of this act."

Sec. 11. "Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such homestead," etc.

The homestead is the place where the family reside—the *home*; and, since the exemption is allowed only to the head of a family it is obvious that the provision is not made solely on account of the husband, but has in view also the wife and children—the family: 1 Am. Law Reg. (N. S.) 645-651.

These exemptions, in view of their benevolent and humane character, are entitled to be liberally viewed by the courts (*ib.*), although, of course, the right must be claimed under the qualifications and conditions prescribed by the statute. Now, by the bankrupt act, the assignee takes "all the property conveyed by the bankrupt in fraud of his creditors" (section 14), that is, takes it as fully and effectually as if the fraudulent conveyance had not been made. As respects the assignee, the property is still the bankrupt's at the date of the bankruptcy, and the assignee takes under or through him.

Except for the deed to Wilder the bankrupt would be entitled to the exemption. But, as we have seen, the assignee does not and cannot claim under that deed, but in hostility to it; and when it is avoided, and the title placed in the assignee, I do not think (in view of the purpose of the exemption) that the husband is estopped, as against the assignee, to claim the right to the homestead, or the value, to

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the extent given by the statute. This view does not make the estate any less than if the fraudulent conveyance had not been made, while the opposite view gives the creditors a profit out of the attempted fraud, at the expense of the family for whose benefit the exemption is mainly if not wholly provided.

If the law gave to a single man the right to this exemption, it would accord with the natural desire to punish fraud, to visit a penalty upon him; but to denounce a forfeiture of the homestead where there is a family, subverts the policy on which the exemption is provided and allowed.

KREKEL, J., concurs.

REVERSED.

NOTE.—Construction of Missouri statute on the subject of the homestead exemption: See *In re Hook, post; Smith* v. *Kehr, post.*

Construction of Nebraska statute on same subject: *In re Cross, post.*

Construction of constitution of Kansas upon the same subject: *Rix* v. *Capitol Bank, post; In re Tertelling, post.* Of the statute of Kansas: *In re Jones, post.*

Generally as to homestead right: 1 Am. Law Reg. (N. S.) 645–651, and cases there cited; *Smith* v. *Kerr, post.*

JOHN FORD SMITH, Assignee of Martin Meyer, *v.* EDWARD C. KEHR, *et al.*

1. A and his wife separated and executed articles under which A gave for his wife's benefit $2,000 in cash, and his notes for $5,000, secured by deed of trust on his realty, she and her trustee covenanting in consideration thereof that she would not claim maintenance from A, or contract debts on his account, or claim dower in his estate. After six weeks separation, the parties came together again and executed new articles, declaring the former articles void except so far as they created a separate estate in favor of the wife. They lived together

for several years thereafter, when A fled the country and was adjudged bankrupt on a creditor's petition. *Held*, in a suit by the assignee in bankruptcy of A, that *the conveyance for the wife's benefit was voluntary* and therefore void as against creditors.

Held, also, that *subsequent* as well as antecedent creditors should be admitted to share *pro rata* in the proceeds of the property.

2. The conveyance, though void as against creditors, was good as between husband and wife, and conveyed the *husband's right of homestead*. *Held*, therefore, that the wife was entitled to a homestead allowance out of the proceeds of the property.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.— Voluntary Conveyance by Husband to Wife. —Articles of Separation.—Subsequent Reconciliation.—Homestead Exemption.

THIS is an appeal in bankruptcy from a decree of the district court for the eastern district of Missouri.

The appeal is taken by the assignee, by Mrs. Meyer the wife of the bankrupt, and by Vogler, a creditor. Mrs. Meyer claims that the district court erred in not allowing her the amount of the notes for $5,000 given to her by the bankrupt under the articles of separation; the assignee complains of so much of the decree as allows Mrs. Meyer's $1,000 as a homestead exemption, and Vogler insists that the court erred in not recognizing that he was entitled to priority of payment over the other unsecured creditors of the bankrupt.

The facts of the case and the grounds of decree which was rendered in the district court were carefully stated in the following opinion of the district judge delivered at the time.

TREAT, J.—In the fall of 1867, the bankrupt executed to Kehr, as trustee, a deed to secure the payment of $5,000 to his wife's trustee. Kehr, under the deed of trust and pending bankruptcy proceedings against Meyer, sold the prop-

erty to her trustee for her benefit, for a sum greatly less than the value of the property, but had not delivered the deed when this bill was filed.

The bill alleges that there was no consideration for the deed to Kehr, and that said deed was fraudulent as to creditors, said Martin Meyer being largely indebted at its date. There was a prior deed of trust on the property to secure the payment of $2,000 and three interest notes for $180 each, one of which interest notes was due when the deed was made to Kehr.

Pending this bill the property was, by order of court, sold under the prior deed of trust, the assignee in bankruptcy joining in said order, reserving to the parties the right to proceed against the fund. At that sale the property brought $10,500. At the previous sale by Kehr, it brought only $5,000, subject, however, to the deed of trust. As the sale by Kehr was made after the petition in bankruptcy was filed, and without any action had thereon by this court, that sale would have been set aside if the subsequent sale under a prior deed of trust had not passed the title. As it is, Kehr will be perpetually enjoined from delivery of deed to Mrs. Meyer's trustee. The controversy now is against the fund. It is not disputed that the amount due under said prior deed of trust must first be paid. Meyer, at the time of making the deed for his wife's benefit, was indebted to Vogler, who has interpleaded, in the sum of $7,126.

In August, 1867, Meyer and wife separated. By formal articles of separation, it was agreed, among other things, that he should pay to Schæffer, as her trustee, $7,000 for her maintenance, and she and her trustee covenanted that she would not claim thereafter any maintenance or support from said Mayer, but that said $7,000 should be in full satisfaction for any claim for alimony; that she would contract no debts on his account; would make no claim to any interest or dower in his estate, &c. It was also agreed that

the separation thus voluntarily stipulated should not be considered as any confession of guilt on the part of either, and that neither should be precluded from an action for divorce, if any cause therefor existed.

On the execution of these articles, Meyer paid to Schæffer, as his wife's trustee, for her benefit, $2,000 in cash, and executed the deed to Kehr to secure the payment of the other $5,000 with interest. On the 18th of October, 1867, Meyer and wife and Schæffer made another agreement, whereby Meyer and wife agreed to live together again, forgiving all past differences and to rescind all the stipulations of the articles of separation except so much thereof as created a separate estate for her benefit, with the modification that while they lived together Meyer should not pay interest on said $5,000. It was also agreed that the new arrangement should be "a complete condonation." Afterward Meyer and wife continued to cohabit as if no separation had occurred, and they occupied the property in controversy until he fled from the country. Does the condonation operate as a revocation of the post-nuptial settlement? The agreement of October prevents such a result, further than that, it rids the case of the question, whether the covenant by the trustee in the articles of separation made the consideration for the conveyance "valuable and meritorious," instead of "purely voluntary." The effect of the deed for $5,000, and of the October agreement, is to leave that deed a purely voluntary conveyance, unless there entered into the consideration other elements than appear on the face of the papers. It is contended by her counsel that there were such elements.

His views are as follows: Mrs. Meyer was the widow of John Johle, and administratrix of his estate when she married Martin Meyer. He, on her marriage with him, became administrator *de bonis non.* The property belonging to Johle's estate was sold by order of the probate court, and the realty was bought by Meyer for $2,200—a sum far less

than its real value—with the understanding that when Meyer resold it he would settle on his wife whatever profit was made thereon. It is also alleged that the profit realized by Meyer from that transaction and from the estate of Johle was about $5,000, and, pursuant to his repeated promises, the deed of trust to Kehr for her benefit was made, and therefore should be upheld in equity as a valid post-nuptial settlement. Without discussing the doctrines invoked with regard to post-nuptial settlement, it is sufficient to state that they are inapplicable to the facts before the court. The settlement of her account in the probate court as administratrix shows $6,765 in her hands belonging to the estate.

Mr. Meyer's settlement shows that he was charged with that balance, and that on final settlement Johle's estate was indebted to him $7,430. Hence, unless those records were falsified, nothing came to Meyer as belonging to that estate. The sale of realty was made by the clerk of the probate court, by order of that court, and as Johle left two children, any such pretended agreement between Meyer and wife as is alleged, whereby he was to acquire that property at less than its real value, and give to her the difference between the price at which he bought it and that at which he might sell it, would have been, if made, a palpable fraud on creditors and heirs. But there is no evidence to support such allegation; nor is there any evidence that the real estate was sold by Meyer for more than he paid for it. The deeds offered in evidence, together with the abstract of titles, indicate that the property bought by Martin Meyer at the probate sale he sold the same day to F. J. Harke; but as the deed to Harke is not produced, the price does not appear. There is a deed of trust from Harke reciting the sale to Meyer, and by Meyer to Harke, as occurring the same day, and as being for same property, said deed of trust being to secure three notes, for $450 each, as part of the purchase money. The probate deed to Meyer and his deed to Harke

were dated the same day, and there is no evidence whatever that Harke paid an advance price for the property. But it is contended that the deed to Kraut for $6,500, dated April 16, 1866, was for the Johle property, and consequently indicates a large profit over the $2,200 paid for it. But the Goodfellow deed, dated March 31, 1866, is for that property, showing that Meyer acquired his title thereto from the Goodfellow estate for $3,000, and not from the Johle estate. The deed to Kraut is for the Goodfellow tract, and also for the improvements thereon. It may be that there was a leasehold or some other interest in Johle, but, if so, no evidence to that effect has been adduced. True, Mrs. Meyer relinquished her dower in the deed of trust to Klien, and in the deeds to Harke and to Kraut, but there is no evidence of any agreement that she was to be compensated therefor by her husband. But suppose that Meyer did promise that he would give to her what profits he made out of his Johle purchases, it was a voluntary promise, and would not change the legal aspects of the case, even if any profits were shown to have been made. The deed must then rest for its validity upon other grounds, viz: that Meyer, at the time he made it, had ample property to meet the demands of existing creditors; that after $7,000 had been given to his wife, there was other property ample to satisfy his creditors' demands. In order to show what property he had, Mrs. Meyer and others state that at times he had large amounts of money about his person; that he was reported to be rich; that prior to 1867 he was doing a prosperous business, &c. Now testimony of that loose kind is of small value in the light of subsequent events. But various deeds of trust in his favor are offered to show that he was loaning money on real estate security.

Such evidence is very unsatisfactory. Thus it is said Xavier Meyer, his brother, had given to him a deed of trust to secure $1,000 loaned; but Xavier testifies that his brother

sold the note to the German bank, and such might have happened with regard to the other real estate notes. Harke's deed was dated February 8, 1866, to secure three notes for $450, each one of which fell due before the deed in question, leaving in August, 1867, due $900.

Anthony's deed for $2,000 was due in June, 1867, and was released in September, 1867. The Oberselp deed of trust for $3,000 fell due in November, 1866, and released March, 1867. The Geisel deed for two notes of $1,400 each was for the benefit of Martin Meyer (saddler), evidently a different person. It is shown, indisputably, that when the deed for Mrs. Meyer's benefit was made, her husband owed, secured by a deed of trust on the property in question, $2,180; that he owed Vogler $7,126 — making a total of $9,306.

Witnesses differ as to the real value of this property, but the testimony of one of respondents' witnesses is confirmed by the result.

It brought, free from all incumbrances	$10,500 00
Meyer owned two other lots, say	600 00
If he still owned the St. Ferdinand block, all the evidence of its value which we have is what he gave for it	32 00
Now suppose he had in addition, as connected with his loans and personalty, even	5,000,00
Total	$16,132 00
Deduct, then, the $7,000 to his wife	7,000,00
	$9,132 00

Thus he would have only $9,132.00 to meet his existing debts, amounting to 9,306.00.

A voluntary conveyance under such circumstances cannot be permitted to stand as against existing creditors. The

next inquiry is as to the distribution of the fund. The prior deed of trust to Klien under which the sale was made must be first paid, for that was a valid subsisting lien. The contest for the balance takes this shape: —

Vogler insists that as he was an existing creditor, and the deed for Mrs. Meyer was void only as to existing creditors, he must be paid before any of the subsequent creditors are let in.

Mrs. Meyer contends that if her deed is set aside, then after Vogler and Klien (the only existing creditors) are paid, she is entitled to recover her $5,000; for the deed for her benefit was void only as to those, and not as to subsequent creditors.

The subsequent creditors contend that, as the deed for Mrs. Meyer was void, it is as if never made — it is void *in toto;* and therefore Mrs. Meyer has no claim whatever on the fund until at least all creditors are paid; also, that as Vogler had no lien on the property, although he was an existing creditor, he is, as to this property, since Mrs. Meyer's claim thereto is out of the way, in no better position than the subsequent creditors. The argument is, that the existing and subsequent creditors are on the same footing, just as if no deed had been made for Mrs. Meyer's benefit.

In some English and American cases, it is said that when a voluntary conveyance is set aside, *subsequent creditors* are let in; but it is not said on what footing. In other cases, it is said, they are let in to share *pro rata* with the prior creditors. That ruling must be based on the ground that as the prior creditors had no lien on the property they are like all other creditors at large, and are entitled to no preference. It may not be entirely satisfactory to hold that when a deed is declared void only as to existing creditors, it shall be held void also as to all creditors, and more especially under the American system of recording deeds. A man in debt is supposed to act fraudulently towards existing creditors when

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he gives away so much of his property as to embarrass them in the collection of their demands, for he must be just before he is generous; but subsequent creditors, it is supposed, knowing, at least constructively, that the conveyance is made, do not deal on the faith that the debtor still owns that property. On the other hand, the subsequent creditors did not know that there were prior creditors, and had a right to suppose that the residue of the debtor's property would furnish ample means for the payment of subsequent debts. Were the questions now to be decided for the first time, there might be some hesitancy in holding that a deed void as to existing creditors was to be considered void as to all creditors; for practically, such is the effect of letting in subsequent creditors, especially to share *pro rata*. The courts hold, with great uniformity, that the deed will not be set aside at the instance of subsequent creditors; yet they give to the latter the same benefit when the prior creditors do cause it to be set aside. Why such discrimination as to the right to attack the deed when there is none as to sharing in the result?

The well settled doctrines under the statute of fraudulent conveyances are:

1. That a voluntary deed is not fraudulent merely because there is some indebtedness existing, as was ruled in *Read* v. *Livingstone* (3 John. Chan. Rep. 481), but that such a deed is void as to existing creditors only when made by a person in such embarrassed circumstances as not to leave ample margin in favor of existing creditors. The statute does not use the term voluntary conveyances, but fraudulent; and the good faith of the transfer is always open for review. It is now settled that when there are existing debts for the payment of which an ample margin is not left, the voluntary conveyance is made in bad faith towards ex sting creditors.

2. A voluntary conveyance, when there are no exist-

ing debts, may be void as to subsequent creditors, if it be shown, by facts and circumstances, that the deed was made with an actual intent to defraud subsequent creditors: *Woodson* v. *Poole*, 19 Mo. 340; *Potter* v. *McDowell*, 31 Mo. 62; *Pratt* v. *Curtis*, 6 Bankr. Reg. 139; *Solomon* v. *Bennett*, 1 Conn. 525; *Duhure & Co.* v. *Young*, 3 Bush (Ky). 350; *Holmes* v. *Penney*, 3 Kay and J. 90; *Sexton* v. *Wheaton*, 8 Wheat. 250; *Hindes, Lessee* v. *Longworth*, 11 Wheat. 211; 1 American Leading Cases, 1; *Mattingly* v. *Nye*, 8 Wallace 370; Story Eq. sec. 355, *et seq.*

3. Where a post-nuptial settlement is made in consideration of relinquishment of dower, and of maintenance, especially where the wife's trustee joins in the covenants, that the wife will, in consideration of the settlement made, relinquish all claims to dower in her husband's estate, and will contract no debts on his account, etc., such a settlement is for a valuable consideration, and will be upheld in law, and cannot be assailed in equity by the husband's creditors, unless the amount so settled on the wife is unreasonable or excessive: *Worrall* v. *Jacob*, 3 Merriv. 268; *Stephens* v. *Olive*, 2 Bro. Ch. R. 75; Clancy's Rights of Married Women, 358; *Compton* v. *Collison*, 2 Bro. Ch. R. 304; *Hale* v. *Plummer*, 6 Ind. 123; *Harvey* v. *Alexander*, 1 Rand. 219; *Wiley* v. *Gray*, 36 Miss. 510; *Bullard* v. *Briggs*, 7 Pick. 536; *Harrison* v. *Carrol*, 11 Leigh. 484; *Hargraves* v. *Meary*, 2 Hill. Ch. 226; 35 Penn. St. 357; Story Eq. sec. 1,427 *et seq.*; Mad. Ch. 275, 387.

The deed of settlement as originally drawn and executed was, in legal contemplation, for a valuable consideration, and if the second agreement had not rescinded all provisions of the first, except the grant of the separate estate, that grant would remain valid. But, unfortunately for Mrs. Meyer the last agreement withdrew all of the consideration which was "valuable" as contra-distinguished from "voluntary." After the last agreement there was no covenant

to relinquish dower, etc.; all covenants on the part of herself and trustee were expressly rescinded. The grant thus existed as if made for love and affection merely. The legal inference from "condonation" (concerning which, see 2 Cox Ch. Ca. 99; 2 Wend. 422; 3 Paige, 483; 9 Cal. 479; 9 Wallace, 752; 1 Sm. & Giff. 501; 3 Barn. & Ad. 743) does not arise in the case, because the intention of the parties is clearly expressed in writing, and is therefore not left open for inference. The case of *Walker* v. *Walker*, 9 Wall. 751, does not apply to this case.

4. When a deed is void as to existing creditors and is therefore set aside, all the creditors, prior and subsequent, share in the fund *pro rata.* Magawly's Trust, 5 De Gex & Smales, 1; *Richardson* v. *Smallwood*, Jacob Rep. 552–558; *Savage* v. *Murphy*, 34 N. Y. 508; *Isley* v. *Nisewanger*, Harper, 295; *Robinson* v. *Stewart*, 10 N. Y. (6 Selden), 189; *Thompson* v. *Dougherty*, 12 Serg. & R. 448, 455, 458; 3 Dev. 12–14; 1 Iredell, 32–38; 1 Am. Lead. Cases, 45; *Norton* v. *Norton*, 5 Cush. 529; 4 Dev. 197–204; 3 Johns. Ch. 481–499; 2 Ves. 10; 3 Drewry, 419–424.

"It has been suggested that under the peculiar facts and circumstances of this case, Martin Meyer has a homestead right to $1,000 out of the surplus. The doctrine held in *Clark* v. *Potter*, 13 Gray, 21, and recognized in *White* v. *Rice*, 5 Allen, 73, favors the suggestion of counsel. Recently, in the case of *Cox* v. *Wilder*, *ante*, the circuit judge held that where a deed executed by husband and wife was set aside as fraudulent, it being designed to defraud creditors, neither the homestead nor dower right was lost, but the husband's right to a homestead and the wife's right to dower remain just as if the fraudulent or void deed had never been made. Taking the doctrine in the two Massachusetts cases and the views of the circuit judge, and applying them to this case, it seems that this result follows, viz: That Meyer, so far as the Klein deed is concerned, re-

tained a homestead right to the surplus as against his assignee in bankruptcy; but as the deed of settlement is valid as between the husband and wife, this homestead right passed to her.

Hence the decree will be that the deed of trust to Kehr be declared null and void, as to Meyer's creditors; that Kehr be perpetually enjoined from delivering a deed under the sale made by him as trustee, and that out of the funds derived from the sale of the property in question, there be paid, first, the expenses of said sale; second, to the creditor secured by the deed to Klein, the amount of the debt due to him; third, to Mrs. Meyer $1,000; fourth, the costs of this suit; and that the residue of the fund be held by the assignee, to be divided *pro rata* among all the creditors of the bankrupt's estate under the orders of the district court in bankruptcy.

On the appeal from the foregoing decree the case was argued by

N. Myers, for Mrs. Meyer.

John Ford Smith, for the assignee.

Slayback & Haussler, for Vogler.

DILLON, *Circuit Judge.*—In the summer and fall of 1867, when the articles of separation and reconciliation were made, Meyer, the bankrupt, was engaged in business. The articles of separation and of reconciliation were only a few weeks apart, and there does not seem to have been in the meantime any change in the property or pecuniary situation of Mr. Meyer. He confessedly owed at that time to Mr. Klein $2,180, secured by deed of trust on his homestead property; and to Vogler the sum of $7,126, not secured, and which together amounted to $9,306. His assets were uncertain beyond his homestead property, worth

about $12,000, and his interest in two other lots, worth $300. The evidence as to his personalty and credits does not satisfy me that they exceeded the estimate of the district court, which was $5,000. The debts to Klein and to Vogler have never been paid; and after the allowance of $1,000 for the homestead right, the estate of the bankrupt, consisting chiefly of the homestead property, will not much more than equal the amount due on debts which antedated, in their creation, this settlement upon Mrs. Meyer.

And the main question now made is whether Mrs. Meyer has a right, as against creditors, to have paid to her out of the proceeds of the sale of the homestead property the amount of the notes which were given for her benefit by her husband, and secured by a deed of trust on the homestead property.

She claims that this is a valid lien upon the property in her favor, and that it should be recognized and enforced as such.

I have grave doubts whether a man in business, with assets not exceeding, if, indeed, they equal, $17,000 or $18,000, and who is shown to be in debt over $9,000, can, as against existing creditors, even if there be no actual intention to defraud them, make a settlement of $7,000 upon his wife, which will stand in a contest by her with creditors who were such at the time, and where the alternative is that if the settlement or provision in favor of the wife is sustained the creditors must suffer. But I am of opinion, with the district court, that the effect of the reconciliation and of the articles then executed, was to make the notes and deed of trust in favor of the wife substantially a voluntary settlement or conveyance, and not one for value. If this is so, then it is clear that it cannot be upheld to the prejudice of creditors then existing. Conscious of the inability to sustain the transaction in favor of the wife, unless the agreement to pay her the $5,000 can be made to rest

upon a *valuable* consideration, her counsel has labored with great ingenuity to show that such a consideration existed.

But what value did she give that can uphold the promise in her favor as against the husband's creditors? The promise, by the husband to pay her $5,000, was for her maintenance apart from him and in consideration of her release of dower, &c. All the promises were executory. She returns, and the parties rescind every portion of the articles of separation except that by which he agrees to pay her in the future $5,000—and it is this sum that she now seeks to be allowed, as against creditors of the husband existing at the time. I fail to see any value that a court of equity, which looks at substance, can regard in a controversy between the wife and creditors of her husband. It is argued that the promise of the husband was valid when made, and if so that it cannot be rendered bad by matter afterwards arising. But when the parties in a few weeks rescinded the whole agreement, except in the particular named, when all that the wife had promised as a consideration for the husband's promise had been cancelled, how can equity say that here is a consideration to the husband which as against his creditors will sustain a transaction otherwise fraudulent in contemplation of law? This question is so satisfactorily presented in the opinion of the district judge, with whose views respecting the case in its various aspects I concur, that I consider it to be quite unnecessary to dwell longer upon it.

The husband fled the country and abandoned his wife, leaving her, however, in the actual possession of the homestead property. The assignee concedes that if the husband claimed it, he would be entitled to the $1,000 homestead exemption, but insists that the wife cannot claim it, or that it cannot be allowed to her. It is evident, both from the statute and its policy, that its provisions are intended for the benefit of the family, and, under the circumstances, I

find no difficulty in securing this provision to the wife. To that extent the court could, if necessary, give efficacy to the deed of trust in her favor; if it be necessary that the exemption should be applied for in the name of the husband, the court would even allow her to apply in his name, so as to prevent the amount from going into the hands of the assignee, who has no claim or equity whatever to it. The act of congress of June 8th, 1872 (17 Stats. at Large, 334), has no application to this case, as it was enacted after the adjudication of bankruptcy. The decree of the district court is affirmed.

AFFIRMED.

NOTE.—An appeal to the supreme court of the United States was prayed by Mrs. Meyer, and allowed.

As to the homestead exemption, see *Cox* v. *Wilder*, *ante*, and note.

MARY JONES v. HENRY C. YEAGER.

1. The proprietor of machinery propelled by steam is bound, as respects his employes, to use reasonable care, proportioned to the danger, to see that such machinery is kept in a safe and sound condition; and is liable for damages occasioned to servants not in fault, from the failure to perform this duty.
2. Ordinarily, a master is not liable for an injury to a fireman of an engine, caused solely by the neglect of the engineer to discharge his duty; for example, the duty to see that the boilers are properly supplied with water, where both the engineer and fireman are servants of the same master in the same employment.

(*Before* DILLON and TREAT, JJ.)

Proprietor of Steam-Power.—Liability of Master for Injuries to Servants by Boiler Explosion.—Fellow-Servants of Same Master in Same Common Employment.

ON the 7th of August, 1871, the boiler at the Union Mills, corner of Florida street and Levee, in St. Louis, owned by

H. C. Yaeger & Co., exploded, instantly killing John Scott, the engineer, and John Jones, the fireman. The coroner's jury empaneled at the time rendered a verdict that the explosion was caused by a scarcity of water in the boilers, and the boilers being heated to a high degree through the carelessness of the engineer in charge. Mary Jones, the widow of the fireman, institutes suit against Mr. Yeager, under the state statute, for $5,000 damages, claiming that the explosion was caused by the defective condition of the boilers. At the trial there was some evidence showing that the boilers were old, and their iron in some places less than the ordinary thickness and brittle, and the plaintiff contended that the explosion was caused by such defects. On the part of the defendant, the testimony disclosed that the boilers had been regularly inspected according to ordinance, and had been overhauled and put in good repair but a few months preceding the explosion. Defendant contended that at the time of the explosion, which occurred at two o'clock on Monday morning, and almost instantaneously after the mill was started, there was, owing to the carelessness of the engineer, a scarcity of water in the boilers; that the boiler-plates being over-heated, generated super-heated steam, and that the sudden introduction of water into the boilers so filled with super-heated steam, necessarily caused the explosion.

Hallum, Bereman, & Smith, for the plaintiff.

R. E. Rombauer and *Geo. M. Stewart*, for the defendant.

At the close of their arguments, the circuit judge charged the jury as follows: —

Dillon, *Circuit Judge.*—1. The plaintiff is the widow of John Jones, deceased, and as such brings this action under the statute of Missouri (Gen. Stats. of Mo. 1865, chap. 147),

to recover from the defendant damages for the death of her husband, on the 7th day of August, 1871, caused, as she alleges, by the wrongful act, neglect, or default of the defendant as hereinafter mentioned. That the boilers in the mill of the defendant, where the plaintiff's husband was employed in the capacity of a fireman, exploded on the day last named, and that the explosion caused his instantaneous death, are facts respecting which there is no dispute. By the statute of this state it is provided that "Whenever the death of a person shall have been caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." And it is under this statute that this action is brought by the present plaintiff, to recover damages for the death of her husband, which she alleges was caused by the wrongful act, neglect, or default of the defendant. And the specific neglect or default alleged in the petition, and upon which she grounds her action, is, that the boilers which were in defendant's mill, the explosion of which killed the plaintiff's husband, "were old and patched, and the plates of which they were constructed were worn and weakened by long use and exposure to the action of fire and water, thereby rendering them unfit, unsafe, and dangerous" to use; which was known to the defendant and not known to plaintiff's husband, nor discoverable by him by the exercise of due care on his part. And it is further alleged, that the boiler's gauges, appendages, and machinery were unsafe, dangerous, and unfit for use, and that this was the cause of the explosion. This is denied by the defendant, who also claims that the explosion was caused, not by defective boilers or machinery, but by the negligence and carelessness of

the engineer, who is claimed to be the fellow-servant of the plaintiff's husband, and by the negligence of the plaintiff's husband himself.

2. This makes it necessary for you to determine from the evidence what was the cause of the explosion in question.

The plaintiff's theory is, that the explosion was caused by the defective boilers. What is the duty towards employes of the owner of a steam engine and boilers, in respect to their safe condition? This is an important question, and must be carefully answered. The employer does not, impliedly, engage to insure his servants that there shall be no accidents resulting from the use of such machinery. Steam, which is a necessary, is at the same time a dangerous, power, and the danger which attends the use of it imposes upon the owner of machinery propelled by it certain duties and obligations, and these are to use ordinary care and prudence (the degree of which must be proportioned to the danger) to have and to keep the boilers and machinery in a safe and sound condition. If the employer knows that his boilers are defective, or if under all circumstances, as a reasonable man, he should have discovered, though he did not, their defective condition, or if he negligently remained ignorant of their defective condition, if the defective condition thereof was the direct and proximate cause of an explosion which injured servants who are blameless, and who did not contribute towards the production of the accident by their own fault or neglect, then the law is that the employer is liable to such servants in a civil action for damages thus occasioned.

If the defective condition of the boilers, and the danger liable to result therefrom, were known to the servant, and if, after such knowledge, he voluntarily remained in the service of the master, this would preclude him, or, in case of his death, his representative, from the right to recover

damages caused by defects of which, and of the nature of which, the servant had knowledge. If, by the nature of his employment, it was the duty of the servant himself to examine and ascertain the condition of the boilers and machinery as to the suitableness or safety, then, in case of an accident resulting from unsuitable or unsafe machinery, the servant, or his representatives, could not recover if the servant had failed to discharge this duty.

But in the absence of a contract, or of usage to that effect, brought home to a fireman of an engine, he would not, by his ordinary employment, be under any special duty or obligation to make examination as to the safe condition of the engine and boilers, and could only be charged with a knowledge of such defects as a person in his situation and employment ought, as a resonable man, to have foreseen, would or might endanger his safety. In the application of these principles to the evidence, you will first inquire whether the boilers in this case were unsafe or unfit for use; and if so, whether the defendant knew it, or as a reasonable man, having a due regard for the safety of his employes, ought to have known it, for if he ought, his neglect in this respect would be equivalent in imposing liability to actual knowledge; and in the next place, you must inquire, and, in order to hold the defendant liable, must find, from the evidence, that this defect was the direct and immediate cause of the accident, without which it would not have happpened; and if you thus find, then defendant would be liable, provided you also believe, from the evidence, that the plaintiff's husband was guilty of no fault or neglect which contributed to bring about the explosion, and was not remaining in the service of the defendant with knowledge of the defective condition of the boilers, and the danger reasonably to be apprehended therefrom. You will perceive that it is implied in what has been above said, that the defendant is not liable, even though the boilers were de-

fective, provided you are of opinion that their defective condition did not cause the explosion, and that the explosion was owing to other causes.

3. And this leads us to make some observations respecting the defendant's theory of the explosion, and the law applicable to it, if found by you to be the true theory.

The engineer on duty at the time of the explosion was Mr. John Scott, employed by the defendant, and who, under authority from the defendant, had, it seems, employed in the behalf of the defendant, plaintiff's husband, who acted as one of the firemen. The explosion occurred about two o'clock on Monday morning. The day before (Sunday), the boilers had, it seems, by the undisputed evidence, been cleaned by the firemen, including Jones, and for this purpose all the water had been let off from them.

Now, it is claimed by the defendant that the engineer, Scott, whose duty it was to see that the boilers were duly supplied with water before resuming work, either failed to cause them to be thus supplied, or if he did not thus fail, he failed to see that the valve whose function it is to keep the water from wasting or flowing from the boilers, was properly adjusted or closed, in consequence of which the water in the boilers gradually ran out during Sunday afternoon and night, so that when the boilers became heated an explosion was the result. If, upon the evidence, you find this to be the true explanation of the explosion, find, in other words, that the explosion was due to the default or negligence of the engineer, in not ascertaining that he had sufficient water in the boilers, he at the time acting in the scope of his employment and in the general line of his duty, without any special directions from the defendant, and that it was not owing to the defective character of the machinery or boilers, then the defendant is not liable; for in the case just supposed, the engineer, who was to blame, and the plaintiff's husband would be fellow servants in the same com-

mon employment, and the master, or common employer, would not be answerable to the fireman for negligence of this character on the part of the engineer, there being neither allegation nor evidence that the master was guilty of negligence in employing or retaining in his service an engineer who was incompetent.

So you will perceive, gentlemen, that you must determine upon the evidence what was the real cause of the explosion, the defective boilers as maintained by the plaintiff, or the neglect of the engineer, or of the plaintiff, as contended for by the defendant.

You will take the case, and confident that you will not strain the evidence to defeat a recovery, and equally confident that you will not, by sympathy with the unfortunate plaintiff, give her a verdict unless upon the evidence and the law, as we have laid it down to you, she is entitled to it as a matter of legal right.

NOTE.—The jury found for the defendant.

Liability of master to servant for negligence of fellow servant: *Fort* v. *Union Pacific Railroad Co. post; Hines* v. *Union Pacific Railroad Co. post.*

ILLINOIS AND ST. LOUIS RAILROAD AND CANAL COMPANY *v.* CITY OF ST. LOUIS AND THE PACIFIC ELEVATOR COMPANY.

1. A municipal corporation may, unless specially restricted, make an irrevocable *dedication* of property to the public *for the use of a public wharf.*
2. Where property within the limits of a municipal corporation and along the bank of a navigable river is dedicated to the public for *the use of a wharf,* and where the municipal authorities are invested with the regulation and control of the uses of the property thus dedicated, they may, unless specially restricted, authorize, under an ordinance not otherwise objectionable, *the erection of a grain elevator* thereon to facilitate the handling of grain at the wharf.
3. The *uses* to which property dedicated or acquired for a *public wharf* may be put, discussed.

4. An ordinance by which the municipal authorities undertake, without express legislative authority therefor, to *surrender* to a private corporation or person *their control over the public wharf* for a fixed period, as, for example, an ordinance giving to private persons the right to occupy a portion of the public wharf with a *grain elevator* for fifty years without reserving the right to resume possession and regulate charges, is void.
5. It is only in virtue of special and individual injuries that *private persons* can apply for *relief in equity against public nuisances;* and to justify such relief, it must appear that the remedy at law is inadequate.
6. This principle applied, and the plaintiffs held not entitled to an injunction against the erection of a grain elevator on the public wharf at St. Louis.

(*Before* DILLON and TREAT, JJ.)

Property Dedicated for Public Wharf.— Uses.—Municipal Control Over.—Grain Elevators thereon.—By Whom Authorized.—Municipal Contracts.—Public Municipal Powers Cannot be Surrendered or Abridged.

THIS cause is, at present, before the court on the motion of the complainant for the allowance of a temporary injunction, to prevent the erection by the elevator company, under an ordinance of the city of St. Louis, of a grain and package elevator upon a portion of the public wharf of the city.

The complainant is a corporation created by the state of Illinois for the purpose of mining and selling coal, with authority to construct and operate a railroad from its mines to a point in that state opposite St. Louis; and with authority, also, to establish and maintain a ferry from its lands in Illinois to the city of St. Louis, for the transportation from shore to shore of the products of its mines, and also of other property, and of teams and travelers. The bill sets out that the complainant is the owner of several duly licensed and enrolled boats and vessels of more than one hundred tons burden, propelled by steam, and which are used by it in transporting coal and other property, as well as persons, to the city of St. Louis, making for this

purpose at least six round trips per day. The bill alleges the regular payment, by the complainant, and by the owners of other vessels, to the city, of wharfage fees or taxes, under the ordinance (No. 7,097) of January 14, 1870, establishing the "Harbor Department" of the city, and avers that the receipts by the city from this source have resulted in a surplus, after paying for the public wharf and its maintenance and repairs; and the complainant claims, that by reason of such payment, it is entitled to the use of the public wharf as a place at which to land its boats, and to load and unload the same, subject to reasonable municipal and police regulations.

The bill avers, that since January, 1870, the complainant has been accustomed, by the direction and designation of the city authorities, to load and unload its boats at and upon a portion of the public wharf, which the city, by the ordinance presently to be mentioned, has undertaken to grant to the Pacific Elevator Company, for the erection of an elevator thereon; that it has paid the city therefor, as wharfage, at the rate of $300 for every term of six months, and that it has so paid up to the 1st day of July, 1872, the bill in the case having been filed April 10, 1872.

It is alleged that this portion of the wharf is the nearest, most natural, and convenient for the business of the complainant, as its road terminates nearly opposite thereto, on the Illinois shore; that no other portion of the wharf has been pointed out to the complainant for his use, and that the remainder of the wharf in and about the business portion of the city is already fully occupied by boats and vessels, and otherwise, and that by reason of the action of the city in the adoption of the ordinance in favor of the elevator company hereafter named, the complainant has been injured, and a cloud cast upon its right as a part of the public, to the use and enjoyment of the wharf.

The bill then sets forth, in detail, the history of this wharf,

with a view to show that the property was *specially dedicated*, either by the proprietors, or by the city, or both, to be used, and used only, *as a public wharf*.

The bill then avers that the Pacific Elevator Company is a private stock corporation, organized under the general incorporation laws of Missouri, for the purpose of erecting, maintaining, and operating within the city of St. Louis, in connection with railroads and river, or either, one or more elevators for the handling of grain and other produce; and that its business is intended to be largely, if not altogether, with the Pacific Railroad Company, and with manufacturers of flour in the city of St. Louis; and that its connection with boats and vessels is but secondary and incidental.

The bill then sets forth the ordinance of the city, of February 6, 1872, numbered 7,925, which is as follows:—

AN ORDINANCE authorizing the construction of a public grain and package elevator by the Pacific Elevator Company, and providing for the management of the same.

Be it ordained by the City Council of the city of St. Louis:—

SEC. 1. For the purpose of better facilitating the loading and unloading of grain and other articles of merchandise landed on the public wharf of the city of St. Louis, the Pacific Elevator Company, upon the conditions and subject to the regulations hereinafter set forth, are hereby authorized to erect, and for the full period of fifty years from the date of the acceptance by them of this ordinance, to maintain a grain and package elevator and appurtenances, with the necessary appurtenances and surroundings thereto, upon that portion of the public wharf of said city included within the following boundaries and description, to-wit: Beginning at a point where the north line of Chouteau avenue produced intersects the east line of the wharf, thence on said line running westward one hundred and fifty feet, thence northward six hundred feet, on a line parallel with the east line of the

wharf, and thence eastward one hundred and fifty feet, to the east line of the wharf, and thence southward along said east line of the wharf six hundred feet, to the place of beginning.

SEC. 2. The elevator hereby authorized shall be erected upon pillars or piers of iron or stone, built to a height sufficient to bring the lower floor of said elevator for eighty feet from the east front as high as on a level with the surface of the warf at the west line of that portion of said wharf described in the first section of this ordinance; and said piers or pillars shall be placed in regular order not less than twenty feet apart, parallel with the east line of the wharf, so as to afford at all times a free water and passageway under the said elevator, except so far as the same may be obstructed by the before-mentioned piers or pillars. The work of constructing said elevator and appurtenance shall be commenced within six months of the approval of this ordinance, and shall be prosecuted with all practicable speed to completion, at a cost of not less than two hundred thousand dollars, and said elevator shall fairly represent that sum in character and capacity, and shall be fully completed within two years from the approval of this ordinance; and in case the said Pacific Elevator Company shall neglect or fail to commence the work of constructing the same within six months from the approval of this ordinance, or having so commenced said work shall neglect or fail to complete the same in the manner prescribed within said two years from the date of the approval of this ordinance, then, and in either cases all privileges granted under this ordinance shall wholly cease. The city engineer shall exercise a general supervision over the construction of said elevator, appurtenances and approaches, so far as may be necessary to protect the interest of the city, and the plan of the elevator and approaches shall be submitted to, and be approved by, him before any work shall be commenced in constructing

the same; and it is especially understood that the city of St. Louis does not part with or grant away its right to regulate and control any part of the wharf and river front occupied or used by said Pacific Elevator Company, and said company shall be subject to such general rules and regulations as the city of St. Louis may prescribe from time to time.

SEC. 3. The elevator hereby authorized shall be used only as a public grain, produce and package elevator, for the storage, loading, and unloading of all grain and merchandise, which shall be tendered, without discrimination, subject only to such reasonable regulations, requirements, and just charges and compensation as said company may deem necessary, not in conflict with the ordinances of the city. Said Pacific Elevator Company shall keep that portion of the wharf described in the first section of this ordinance, as, also, twenty-five feet on the northern and southern sides thereof, at all times clean and in good order and repair, at their own proper cost and expense; and shall remove all sediments deposited both north and south of the above-mentioned lines and boundaries that may have been cause by the erection and maintenance of said elevator on the wharf; and shall, for and during said full term and period of fifty years, render and pay to the city of St. Louis an annual wharfage tax of six hundred dollars, payable semi-annually, on the first day of April and the first day of October of each year.

SEC. 4. In case the privileges and requirements of this ordinance are accepted by the said Pacific Elevator Company, the said company shall file a written statement of such acceptance with the city register within twenty days from the approval of this ordinance; otherwise they shall be deemed and held to have declined such acceptance, and the privileges hereby granted shall cease; and upon the filing of such acceptance within said time the city register shall

give said company a certificate that such acceptance has been so filed according to the requirements of this ordinance.

SEC. 5. The city of St. Louis makes no guarantee in this ordinance of any privilege herein proposed to be extended, and shall in no way be held responsible or in danger for what may result from anything herein contained.

Approved February 6, 1872.

It is alleged that the elevator company have taken actual possession of that portion of the wharf, have *inclosed* the same, and are preparing to erect within the space thus inclosed a large and permanent building under and in pursuance of the terms of the ordinance just mentioned, and which, it is charged, will be a public nuisance.

The prayer is that the ordinance in favor of the elevator company be declared null and void; that the obstructions already made on the wharf be declared nuisances, and ordered to be abated; that the defendants be restrained from further holding exclusive possession of the said portion of the wharf, and from erecting thereon any building or structure which shall not leave the wharf open at all times, to all persons, and for general relief.

A stipulation signed by the parties is filed, admitting that the complainant "by virtue of the facts alleged in the bill has up to the 1st day of July, 1872, such special interest as will authorize it to institute this suit, if in fact the elevator proposed to be erected under ordinance 7,594, would be a public nuisance." The stipulation also admits that "it is the intention of the Pacific Elevator Company to erect and carry on an elevator strictly in pursuance to the ordinance; and the questions submitted to the court are whether the said ordinance is valid; and whether, if the said elevator is erected and conducted strictly in pursuance of the said ordinance, it would be subject to be abated as a public nuisance."

It is also stipulated "that the receipt and shipment of grain in bulk enters largely into the commerce and trade of St. Louis, which is constantly increasing both by river and rail, and that elevators are an economical and expeditious method of handling such grain, but were not in general use at the time the wharf was dedicated or opened."

John W. Noble, for the complainant.

Geo. E. Leighton and *Sharp & Broadhead*, for the defendants.

DILLON, *Circuit Judge*.—The ordinance of the city of St. Louis, adopted February 6, 1872, the validity of which presents the main question for consideration, in terms describes the place upon which the elevator building therein mentioned is to be erected as a "portion of the *public wharf* of the said city." It is material to understand with precision what is meant by the public wharf in St. Louis. The history of the acts of the city in respect to the wharf appears in the papers and documents on file. On March 1, 1851, the mayor was authorized by joint resolution to make arrangements to perfect the title of the city to the entire wharf, or to any portion thereof. On the next day (March 2), the city, by ordinance (No. 2,596), established the eastern and western lines of the wharf, from Plum street to the southern limits of the city—these lines being 265 feet apart; and subsequently the wharf was extended to the northern boundary line of the corporation.

In 1851, also, the owners in old blocks 43 and 44, claiming to be riparian proprietors, and to own what are now known as blocks 855 and 856 (in front of which the elevator is authorized by the ordinance of February 6, 1872, to be erected), executed an instrument by which, "in consideration of the benefit which will accrue to us and the sum of one dollar," they "authorized the city of St. Louis to locate

and construct on any lands claimed by us, a wharf two hundred and sixty-five feet wide, as established by the ordinance of the city (No. 2,596, *supra*)." The instrument then proceeds: "And we do hereby dedicate and appropriate the said lands so taken to the use of a *public wharf*, to hold the same as established in said ordinance No. 2,596, for the use of a wharf, to be under the entire control and management of said city; said wharf to be constructed, repaired, taxed, and wharfage therefrom applied as the city may deem expedient."

The city also claims title or right to the wharf property by quit claim from the public schools, which was expressed to be for the wharf as established, and also under an act of the legislature in 1864–5, and also under an act of Congress of June 12, 1866, granting to the city all the interest of the United States in and to all wharves, etc., within the limits of the city corporation. It is not material in this case to determine what rights to the wharf property came from the one source or the other. So far as the right comes through the instrument made in 1851 by the proprietors of blocks 43 and 44 or 855 and 856 (see *Public Schools* v. *Risley*, 40 Mo. 356; *The Schools* v. *Risley*, 10 Wall. 91), the dedication is expressly for a public wharf. If the city in any way ever owned the fee to what is termed the wharf, the ordinances produced to the court satisfactorily show an irrevocable dedication thereof by it to the use of the public as a wharf. A city corporation, like any other proprietor, may, unless specially restricted, make such a dedication; and when the rights of the public have attached the dedication cannot be recalled. (Dillon on Munic. Corp. sec. 498, and cases cited.)

After what the city has done with respect to the wharf property, no court would allow the corporate authorities to regard it as private and sell or otherwise dispose of it as such.

The counsel on both sides have treated the property as

having been dedicated to public use as a wharf, and the authority over it to be such as exists in the city by virtue of its powers under its charter, and not in virtue of any ownership of it, present or past. We shall accordingly assume the wharf property upon which it is proposed to erect the elevator to be property which, either by the former proprietors or by the city, or both, has been effectually dedicated to the public for a wharf, and that the public may make every use of it, under the control and regulation of the city authorities, or of the legislature, which falls *within*, but no use which falls *without*, the scope and meaning of such a dedication.

The reference to the history of the wharf, so-called; its location on the bank of the river; its width and its length, extending along the whole water line of the city, embracing in the phrase not only the improved, but unimproved portions of the bank, will be seen to be material, when we come to consider the question as to the nature of the *uses* which it is allowable to make of property dedicated for such a purpose.

The legislature, in the charter of the city, has conferred upon the mayor and city council a great variety of powers, and, among others, the following: "8. To construct all needful improvements in the harbor; * * * *to erect, repair, and regulate public wharves and docks;* * * * to regulate the stationing, etc., of vessels within the city; to charge and collect wharfage," etc. After a detailed enumeration of the various legislative powers granted to the city, the charter proceeds: "17. Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its *trade, commerce, manufactures,*" etc.

None of the other provisions of the charter, cited by counsel, seem to have any direct bearing upon the power of

the city over the wharf property. It will be perceived, therefore, that there is no express legislative authority to the city to erect buildings, or to authorize the erection thereof, upon the property known as the public wharf.

And here the complainant takes the position which we shall now consider, that without direct legislative sanction (if, indeed, with it), it is not competent for the municipal authorities themselves to erect, or, under an otherwise unobjectionable ordinance, to authorize the erection of an elevator building upon the wharf, to be used for handling grain arriving at or to be shipped from it. The argument in support of this position is, that the property is dedicated to be used for a particular purpose, viz: for the purpose of a wharf, and that the occupation of it by a permanent structure of any kind, though its design, purpose, and effect may be to facilitate the receipt and transfer of grain or merchandize at the wharf, is an unauthorized use of the property. In other words, it is insisted that it is a perversion of the use for which the property was acquired or dedicated, to allow the erection thereon of an elevator to facilitate the receipt and shipment of grain in bulk at the wharf; and, consequently, that such a structure would, if built, be a public nuisance, and liable to be proceeded against and abated as such. This makes it essential to consider what are legitimate uses of property dedicated for a public wharf; and this must depend, in the absence of controlling legislative enactment, or of special limitations imposed by the dedicator, upon his presumed intention, to be gathered from the nature, situation, and location of the property, and the wants of the public. In 1851, when the city began to take steps to provide more adequate wharf accommodations, it was already possessed of an extensive trade and commerce, mainly carried on by the river. Wisely contemplating the future, it set apart a space along the whole water boundary, and termed it, whether improved or not, the pub-

lic wharf. What was the purpose in setting apart property thus acquired and to be acquired for a wharf? Clearly, it was to make provision that rafts, boats, and vessels of all kinds could effect a landing in front of the city, and have a place upon which to discharge or from which to receive wares, merchandise, and cargoes of all descriptions. This was to be done upon the bank or margin of the river, which, whether improved or not, was compendiously styled the wharf—the public wharf. This is fully shown by the ordinances of the city in relation to this subject.

Both under the dedication referred to and by its charter, the city is authorized to regulate the public wharf. Its right to appropriate different parts of the bank, called the wharf, to different uses of a proper character, admits of no doubt. It may set apart a portion exclusively for steamboats, and require them to land there, and not elsewhere. So it may require rafts, woodboats, coalboats, grainboats, etc., to land at specified and separate parts of the wharf; and such is shown by its ordinances to be the practice of the city in regulating the use of the bank of the river. The parties have stipulated that the receipt and shipment of grain in bulk enters largely into the commerce and trade of St. Louis, which is constantly increasing, both by river and rail, and that elevators, by means of the mechanical contrivances within them, afford an economical and expeditious method of handling grain arriving in this condition. Formerly grain was carried almost wholly in sacks, and was deposited on the wharf or levee preparatory to its transfer to vessels on the one hand, or to drays or other vehicles, on the other, and, in this shape, arriving in small quantities, it was easily protected from rains by means of tarpaulins, or in some similar manner. Can it be questioned, however, that the city authorities, if they had deemed it expedient, might not have erected, at various places, structures on the wharf to shelter grain in this condition? That they may not

have found it necessary is no test of the measure of the right, and no evidence that every use of the wharf is illegitimate which contemplates the erection of a structure upon it. But now grain reaches St. Louis in bulk, and how shall it be handled? Must the owners incur the expense and delay of putting it into sacks or of transferring it by shovels into wagons, while the rest of the world freely make use of cheaper and improved modes of handling it?

A single elevator, occupying a small portion of the wharf, may be made to handle one hundred thousand bushels or more of grain per day, at a trifling cost per bushel, while the handling of the same amount in sacks or wagons would require a much larger space of the wharf, and be attended with delays and with increased expense, both to the owners and the public.

The dedication of the property was perpetual, and for the benefit of the public. The extent of the dedication, its scope, remains the same, but the mode of using property dedicated for a wharf may change from time to time as the wants of commerce or the public may require, and this the dedicator is presumed to contemplate when he makes the dedication.

What benefit is it to the dedicator to insist when grain reaches St. Louis in bulk that it shall be sacked or hauled away in vehicles? What right has the owner of a steamboat plying the river and not constructed with a view to carrying grain in bulk, to insist that the old methods shall be continued? If the city, under the powers conferred upon it before mentioned, should see fit to set apart a portion of the wharf for the landing of boats carrying grain in bulk, and to erect thereon artificial contrivances to facilitate the loading and unloading of such vessels, it has, in our judgment, the clear right to do so; and since grain in this condition requires to be effectually protected from the weather, proper structures to afford such protection may be

erected by it on the wharf, the same as it might make any other improvement germane to the purposes of a wharf and within the scope of the dedication.

A wharf differs in many material respects from a street. The latter is primarily intended for the purposes of passage or travel, and any erection in it, without legislative authority, is a nuisance; but a wharf is intended to afford convenience for the landing of vessels, the loading or unloading of their cargoes, and to supply a place on which the wares discharged from vessels or awaiting shipment may be laid or deposited; and it would seem that structures or appliances of any kind intended, and which have the effect to facilitate the handling and preservation of merchandise arriving at the wharf, erected upon it under municipal authority, and remaining at all times subject to municipal control, would be lawful and within the purposes for which the wharf property was acquired or dedicated.

We do not say that the municipal authorities could use the wharf property for mere warehouse purposes, though we have no doubt that it would be competent for them to erect, or authorize the erection thereon, of such structures for the receipt and shipment of goods by water, as they might deem expedient in order to promote the trade and commerce of the city.

And we are clearly of opinion that the erection, under the sanction of the city, of an elevator to be used in handling grain at the wharf, and at all times under the direction and control of the municipal authorities, is such a use of wharf property as does not fall without the scope of dedication, and such a structure would not, therefore, be a public nuisance.

We have not met, nor have the counsel cited, any adjudications upon the precise point; and we have, therefore, been compelled to decide it upon principle, and have felt

that it was due to the importance of the question to set forth our views, as we have done, with considerable fullness.

The next question is, whether the ordinance of February 6, 1872, authorizing the elevator company to erect, maintain, and carry on the elevator upon the wharf, is valid. One effect of this ordinance, if valid, is, in my opinion, to set apart and surrender to the exclusive use of the Elevator Company, for the full period therein named, one hundred and fifty by six hundred feet of the public wharf. This ordinance, when accepted by the company, as it is alleged it has been, constitutes a contract between it and the city; and if it be a valid contract, and shall be complied with by the company on its part, it must continue in force and be binding upon the city for the next fifty years. Whatever may be the changes in the condition and wants of the city, or of the public, within that period, the hands of the municipal authorities are effectually tied by this contract, and the Elevator Company has the right to maintain the structure and to retain possession of this portion of the public wharf. It it should become, in the judgment of the mayor and city council, positively detrimental to the welfare, trade and commerce of the city, or if the space it occupies should, in their opinion, be more urgently needed for other purposes, still this structure must remain.

The ordinance, if valid, places the property occupied by the elevator beyond the control of the city authorities. Nay, more: if it is a contract (as it is, if valid), it possesses all the legal attributes of a contract, is within the protection of the national constitution, and the elevator company may not only hold possession of this portion of the wharf, and carry on its business there against the will of the city corporation, but equally against the will of the legislature, which is the supreme guardian of the public rights in all public places.

In the light of these grave consequences, we shall inquire

presently, whether the corporation of St. Louis has been clothed by the legislature with the power, not only to disable itself, but also to disable the legislature, except by the exercise of the *eminent domain*, for half a century from full and unrestrained control over the public wharf and its uses.

Another effect of this ordinance, in my opinion, if valid, is, that the city has no control over the charges which the Elevator Company may make for its services in handling and storing grain and other property. Counsel argue that the power was expressly reserved by the city; but on careful consideration of the provisions of the ordinance, my judgment is otherwise. The language of the ordinance in this respect is this: "It is especially understood that the city of St. Louis does not part with or grant away its right to regulate and control any part of the wharf and river front occupied or used by said Pacific Elevator Company, and said company shall be subject to such *general* rules and regulations as the city of St. Louis may prescribe from time to time. The elevator hereby authorized shall be used only as a public grain, package, and produce elevator, for the storage, loading and unloading of all grain and merchandise which shall be tendered without discrimination, subject only to such reasonable regulations, requirements, and just charges and compensation as the said company may deem necessary, not in conflict with the ordinances of the city."

Without any reservation whatever, the legislative and police power of the city over this structure, except so far as controlled by the contract, would remain.

The language that the city does not part with its right to regulate and control the portion of the wharf used by the elevator company, can be true only in a qualified sense; for, as above shown, it has parted, on the assumption that the ordinance is valid, with its right to control the use of it for fifty years. The special reservation is, that the company shall be subject to such *general* rules and regulations as may

be prescribed by the city—not *special* rules and regulations for this particular elevator, even if the general language "rules and regulations" would embrace the right to fix tariffs and prices.

Assuming that the use of the wharf for an elevator is a legitimate use, and this ordinance granting the right to the elevator company thus to use it, is valid, I cannot find any provision of the ordinance which fairly admits of the construction that the company has parted with its right to fix its own prices and agreed to abide by those fixed by the city, or by which the power of the city over the prices to be charged by this elevator company is any greater than over the prices to be charged by others. In the absence of a concession of the right, the elevator company would, of course, have the unqualified power, as against the city, to prescribe its own prices. If it be claimed that it has surrendered this right, the *onus* lies on the party advancing the claim to establish it. The point is one of great consequence, and how easy and how natural it would have been, if such had been the intention of the parties, to have said, in terms the city may regulate prices.

This conclusion finds some support, also, in the fact that the company pays the city an annual compensation for the use of the property; and in the further consideration that it is not to be presumed, nor upon doubtful grounds held, that the company have agreed to expend at least $200,000, and have the value of that investment depend upon the uncontrolled action of the city authorities.

I attach less importance, however, to this point, because, if mistaken in respect to it, my opinion would still be, that the ordinance is invalid, on the ground first suggested, viz: that the city cannot, under the powers given in its charter before mentioned, thus surrender the control over the use of the wharf property.

The only powers delegated to the city by the legislature

in respect to wharves have been before mentioned, and they are, in substance, to erect, repair, and regulate them, and to pass ordinances to promote the welfare, commerce, and trade of the city. These are public or legislative powers, incapable in their nature of delegation or of surrender by the municipality. It is too plain for argument, that under these general powers, the city could not sell or alien any portion of the wharf property, whether acquired by dedication or condemnation. It is equally plain, that they do not authorize it to make a lease of the property to private individuals for a fixed period incapable of determination by the city at its will. If the city may, by a binding contract, surrender its control over six hundred feet of the wharf property, it may, on the same principle, equally surrender its control over six thousand feet. If it may surrender its control for fifty years, it may equally for ten times fifty years, and what is the practical difference between that and an absolute alienation?

It is to be borne in mind that the supreme or ultimate control over the uses of public places is in the legislature, and that the only powers in this respect possessed by the city are derivative and rest upon legislative grant.

The only grant is of the power to regulate the wharf, and this falls far short of conferring upon the city the power to surrender for a fixed period its exclusive use to private persons or corporations. Such authority must rest in a plain grant from the legislature.

These principles are not new. On the contrary, it has been decided time and time again that powers conferred upon municipal corporations for public purposes cannot be either delegated to others, or surrendered, or renounced. Such corporations may adopt by-laws or make authorized contracts, but they have no power as a party to enter into contracts or pass ordinances which shall cede away, control, or embarrass their legislative or governmental powers, or

which shall disable them from performing at all times their public duties. The reports are full of cases establishing this salutary doctrine; and, for the protection of the public, it it of the first importance that it shall be maintained by the courts in undiminished efficiency. (See cases cited in Dillon on Munic. Corp. sec. 61; *Ib.* secs. 542, 567.)

One instance will suffice to illustrate the principle. The city of New York possessed by its charter the general power to open, alter, repair, and regulate streets. Under this power, without any express authority from the legislature, the corporation of the city undertook to confer by resolution upon an association of persons the exclusive right to construct and maintain for a term of years, a street railway in Broadway. The judgment of the court was against the validity of the resolution, and rested upon the sound principle that the powers of the corporation in respect to the control of its streets cannot be surrendered or delegated by contract to private parties; and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract; void, however, because if valid it would deprive the corporation of the control and regulation of its streets. "Taking the whole ordinance together," says COMSTOCK, J., in his opinion, "it is no less than an abrogation by the common council of their powers and duties over and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals, or a private corporation. This the corporation of New York cannot do. Time and experience may give a very unfavorable solution to the question whether this railroad or any railroad in Broadway, can be beneficial to the public, but the hands of the city government will be tied by the contract into which it hasentered, and future change and improvement may be

prevented by the voluntary surrender—in effect in perpetuity—of its own powers. On this ground the ordinance is void." *Davis* v. *Mayor, etc. of New York*, 14 N. Y. 506, 532.

This view was subsequently approved by the same court: *Milhau* v. *Sharp*, 27 N. Y. 611. And the same principle is asserted in *Goszler* v. *Georgetown*, 6 Wheat., 503, 597, where, in the language of Chief Justice Marshall, it is held that a municipal "corporation cannot abridge its own legislative power."

The doctrine is unquestionably sound, and it is decisive against the validity of the ordinance under consideration. It is scarcely necessary to observe that an attempt to surrender the control over a street or public wharf for fifty years is just as objectionable in principle as where the surrender is without limit as to time. The principle is, indeed, the same.

My brother TREAT concurs in the principles of law which have just been stated, but he differs with me on the question of the validity of the ordinance. In his judgment, applying to the ordinance the well known principle that public grants are to be construed strictly against the grantees and liberally for the public, he thinks that by the proper construction of the powers reserved in the ordinance to the city authorities they have the right at any time, if necessary for wharf purposes, both to resume possession of the portion of the wharf on which the elevator may be built, and to regulate the charges which the elevator company may make for their services. In this view of the reserved powers of the city under the ordinance I can not concur. I am clearly of the opinion that if the elevator company complies with the ordinance, it was the intention to give it a right "to maintain" the elevator "for the full period of fifty years," and I strongly incline to the opinion that the regulation of tariffs is also beyond municipal control.

We agree in opinion, however, that under the charter as

it stands, it is essential to the validity of the ordinance that the municipal authorities shall at all times have the right to resume possession of the ground occupied by the elevator, and to control and regulate the prices which may be charged thereat, and that these powers, certainly without plain legislative authority to that effect, can not be surrendered or bargained away for any fixed or definite period. The only point of difference is, whether under the ordinance in question the city has reserved the right at any time during the fifty years, to regain possession of the property, and at all times to regulate the compensation and charges of the elevator company; if it has we would concur in the opinion that the ordinance is valid, and if it has not, that it is void.

The next and only remaining question is whether, if the foregoing views be sound, the *plaintiffs* are entitled to an injunction to restrain the erection of the elevator. They ask it on the ground that if erected it will be a public nuisance, because the structure can derive no legal sanction from a void ordinance.

We need not inquire what right the state would have to abate an elevator or other structure erected on the wharf without legal authority, for the state or its officers are not parties to the present bill. Equity, it is well known, will enjoin or relieve against a public nuisance where there is imminent danger of irreparable mischief before there can be an effectual remedy at law, when its jurisdiction is invoked in behalf of the state or the public. But in order to justify equitable interference in behalf of private parties, it must appear that they are in danger of suffering individual and special injuries beyond those suffered by the public at large, and of a nature for which the remedy of a private action for damages would be inadequate.

It is only in virtue of special and individual injuries that private persons can ask for equitable relief. (*M. & M. R. R. Co.* v. *Ward*, 2. Black, 485; *Georgetown* v. *Canal Co.* 2

Pet. 191; *Wheeling Bridge Case*, 13 How. 518; *Spooner* v. *McConnell*, 1 McLean C. C. 337.)

Upon these principles, it is plain, admitting the substantial averments of the bill to be true, that no case is made out by the plaintiff for an injunction to restrain the violation of their individual or private rights. It is not shown that they have now any right to land or to insist upon landing at, or to use that portion of the wharf, on which it is proposed to erect the elevator. On the contrary, it is manifest that they have no such right; but that it is competent for the city authorities to require them to land their boats elsewhere, and to prohibit landing them at the place where the elevator is to be built, unless laden with, or designed to carry, articles or merchandise for which that portion of the wharf is set apart.

There is no claim that the city authorities have sought to deprive the plaintiffs of the right to land at or do business upon the wharf; and to justify an injunction in their behalf, it should appear that they have a right to land upon this particular portion of the wharf where the elevator is to be built, or that its erection there will, in some other way, be specially injurious to them, and so injurious as to require relief in equity. No such case is shown. And it would seem difficult to make such a case when it is clearly within the lawful power of the municipal authorities to prescribe where the plaintiffs and all other persons shall land, and how and under what regulations, reasonable in their character, they are entitled to use the wharf.

We concur in holding that the motion for a preliminary injunction in the plaintiffs' behalf to restrain the erection of the elevator must be denied.

INJUNCTION DENIED.

NOTE.—This decision was acquiesced in by the parties. That the legislative powers and public trusts conferred upon municipal corporations cannot, without express or plain authority from the legislature, be bar-

gained away, or surrendered, or abridged, either by contract or ordinances, is a doctrine which has been often decided and is settled law. Such corporations must at all times retain the full possession of their legislative powers, so as at all times to be able to discharge their public duties. An interesting recent illustration of this doctrine in a case analagous in principle to the one decided above, will be found in *Gale* v. *Kalamazoo*, 23 Mich. 344, 1871, relating to a municipal contract respecting a market house for the city. See, also, *People's Railroad* v. *Memphis Railroad*, 10 Wall. 38, 50, 1869; *Louisville City Railroad* v. *Louisville*, 8 Bush (Ky.), 415, 1871; *Brooklyn* v. *City Railroad Co.* 47 N. Y. 475, 1872; *Milhau* v. *Sharp*, 27 N. Y. 611, 1863; *Presb. Church* v. *Mayor, etc. of N. Y.* 5 Cow. 538, 1826; followed, *Stuyvesant* v. *Mayor, etc. of N. Y.* 7 Cow. 588; *Sav. Fund* v. *Philadelphia*, 31 Pa. St. 175; *Ex parte Mayor, etc. of Albany*, 23 Wend. 277; *Railroad Co.* v. *Mayor, etc.* 1 Hilt. 562, 568; *Martin* v. *Mayor, etc.* 1 Hill (N. Y.) 545, 1841; *Goszler* v. *Georgetown*, 6 Wheat. 593; Sedgw. Const. and St. Law, 634; *State* v. *Graves*, 19 Md. 351, 373, 1862; *Bryson* v. *Philadelphia*, 47 Pa. St. 329; Cooley, Const. Lim. 206; Albany St. 6 Abb. Pr. R. 273; *Dingman* v. *People*, 51 Ill. 277; *Brimmer* v. *Boston*, 102 Mass. 19, 1869; *Johnson* v. *Philadelphia*, 60 Pa. St. 445; *State* v. *Cin. Gas Co.* 18 Ohio St. 262, 295; *Jackson* v. *Bowman*, 39 Miss. 671, 1861; *Oakland* v. *Carpentier*, 13 Cal. 540, 1859, opinion of BALDWIN, J.; *Smith* v. *Morse*, 2 Cal. 524. Compare *Attorney General* v. *Mayor, etc. of N. Y.* 3 Duer, 119, 131, 147; *Davis* v. *Same*, 14 N. Y. (4 Kern.) 506, 532; *Costar* v. *Brush*, 25 Wend. 628.

In re ZADOK HOOK, Bankrupt.

The Missouri homestead-exemption statute provided that it "should not apply to any debts or *liabilities* contracted before" it took effect: *Held*, that where a public administrator gave an official bond and received personal property of the decedent before the homestead statute went into force, his *liability* to the heirs and distributees arose in such a sense as to deprive him of a homestead exemption in property acquired after he received the assets of the estate, although it did not appear that at the time the property claimed as a homestead was acquired, the administrator had then converted the assets of the estate which had come into his hands.

In re Hook, Bankrupt.

(*Before* DILLON and KREKEL, JJ.)

Homestead Exemption Statute of Missouri Construed.—Previous Debts and Liabilities.

THIS cause is here under the second section of the bankrupt act to review an order of the district court for the eastern district of Missouri.

In 1861, the bankrupt Hook became the public administrator for Callaway county, Missouri, and gave an official bond, with sureties, for the faithful performance of his duties. [See *Hook* v. *Payne*, 14 Wall. 253; S. C. 7 Wall. 425.] In February, 1861, he took upon himself the administration of the estate of one Fielding Curtis, and at that time received personal property to the amount of $75,000 belonging to the estate. Afterwards, the distributees and next of kin of the said Fielding Curtis brought suit against Hook and his sureties on the administration bond, and recovered judgment against him in this court for over $40,000, which remains unsatisfied, and which has been proved up in bankruptcy against Hook's estate. After the execution of the bond of Hook as public administrator, and after Hook obtained possession of the property of the estate of Fielding Curtis, but before any conversion of the property by Hook is shown to have occurred, Hook acquired the property in which he now claims a homestead right.

On the 23d day of March, 1863, the Missouri homestead act was passed (Laws 1863, p. 21). This act gives a homestead right to the extent of $1,000; and it is provided by the act itself that it "*shall not apply to any debts or liabilities contracted before*" it took effect, which was on the 23d day of March, 1863.

In 1869, the homestead property was sold by the assignee in bankruptcy, yielding a surplus of $2,400 after paying off the incumbrance upon it; and Hook filed in the bankruptcy

court his petition for an order on the assignee to set aside and pay over to him $1,000, as exempt to him in lieu of his homestead; and this petition was resisted by the distributees and next of kin of the said Fielding Curtis, who obtained against the bankrupt the aforesaid judgment.

Glover & Shepley and *Meyers*, for the creditors.

W. B. Thompson & Henderson and *Hayden*, for the bankrupt.

DILLON, *Circuit Judge.*— We hold that the bankrupt is not entitled to the exemption; that the claim of the heirs and distributees was a *liability* contracted before, and in existence when, the homestead act was passed.

KREKEL, J., concurs.

AFFIRMED.

NOTE.—Construction of homestead exemption provisions: See *Cox* v. *Wilder*, *ante*, and cases cited in note.

UNITED STATES v. HORTON'S SURETIES.

1. A United States commissioner, as respects the taking of bail, has the same power as a state magistrate and no greater.
2. The statute of Missouri provides that a magistrate may adjourn the examination of a prisoner for a period not exceeding ten days at one time. At the request of a prisoner charged with violating the revenue law, a commissioner adjourned the examination for nineteen days, and took bail for his appearance at the end of that time. The bail having been forfeited: *Held*, on a suit against the sureties, that the commissioner's order for the appearance of the accused after an interval of nineteen days was directly contrary to law, and that the recognizance for such appearance was invalid, and that the consent

of the accused could not confer jurisdiction or power to make the order, nor does it estop him or his sureties to set up the invalidity of the recognizance.

(*Before* DILLON, *Circuit Judge.*)

Taking Bail.—Power of United States Commissioner.

ONE Horton was arrested for a violation of the internal revenue laws, and taken before Chamberlin, a commissioner of the United States for this district, for examination, on the 30th day of May, 1872. The accused asked for a postponement, and the commissioner adjourned the proceedings until the 19th of June following, and required the defendant to enter into a recognizance, with sureties, for his appearance before the commissioner at the adjourned time, and it was under this order that the recognizance in suit was executed. Horton failed to appear, and his default was duly entered. This suit is on the recognizance. The sureties defend. The district court held the recognizance to be valid, and judgment was rendered against the sureties, who bring the same and the bill of exceptions, by writ of error, to this court.

The constitution of this state provides that *all* persons shall be bailable, except for capital offenses.

The statute of the state enacts that "a magistrate may *adjourn* an examination of a prisoner pending before himself, from time to time, as occasion requires, *not exceeding ten days at a time,* * * * and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by the prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner." (2 Wagner, 1075, sec. 88.)

The act of Congress of 24th September, 1789, sec. 33, provides that "for any crime or offense against the United States, the offender may by * * * any justice

of the peace of any of the United States where he may be found, *agreeably to the usual mode of process against offenders in such state,* * * * be arrested, and imprisoned or *bailed*, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." By the act of 23d August, 1842, sec. 1, it is provided that United States commissioners "shall and may exercise all the powers that any justice of the peace * * * of any of the United States may now exercise in respect to offenders, by arresting, imprisoning, or bailing the same under the act of 1789."

Wm. Patrick, district attorney, for the United States.

Fletcher & Reynolds, for the defendant.

DILLON, *Circuit Judge.*—The record shows that the principal cognizor was charged with an offense against the laws of the United States, and was arrested and taken before a commissioner for this district, who, upon his application, continued the time for the examination and hearing of the charge for the period of *nineteen* days, and thereupon ordered him to find bail in the sum of $500 to appear before the commissioner at his office on the day to which the adjournment was thus made.

The recognizance in suit was given in pursuance of this order. The principal failed to appear at the time and place to which the hearing was adjourned, and his default was entered by the commissioner.

The substantial question presented for determination is, whether the recognizance taken under these circumstances is binding upon the cognizors. It is settled that bonds of this character are valid only when taken in pursuance of law and the order of a competent court or officer: (*United States* v. *Goldstein's Sureties*, 1 Dillon, C. C. R. 413; *United States* v. *Rundlett*, 2 Curtis, C. C. R. 41, 45.) Whatever au-

thority the commissioner has in respect to the arresting, imprisoning, or bailing of criminal offenders is conferred by statute, and must be exercised by him pursuant to its requirements. Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the 33d section of the judiciary act, it provided that the procedure in such cases should be "agreeably to the usual mode of process against offenders in such state," that is, in the state in which the offenders may be arrested and the proceedings had. To this section we must resort to ascertain the powers of commissioners in respect to the arrest, imprisonment, and bail of offenders against the laws of the United States. The meaning of this section was very carefully considered by Mr. Justice CURTIS, in the *United States* v. *Rundlett*, *supra*. This learned judge there says: "My opinion is that it was the intention of Congress by these words, 'agreeably to the usual mode of process against offenders in such state,' to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them in those states where justices of the peace, or other examining magistrates, acting under the laws of the state, have such power. The prisoner is not only to be arrested and imprisoned, but bailed, agreeably to the usual mode of process in the state."

As the legislation now stands, a commissioner, as respects taking bail, has the same power as state magistrates and no greater. On this principle it has been recently held by Judge WOODRUFF, that in New York, where state magistrates have no power to take recognizances to appear before them at a subsequent day, United States commissioners

have no such authority, and a bond conditioned for the appearance of the accused before the commissioner on a future day to which the proceeding was adjourned, was void. (*United States* v. *Case*, 8 Blatchf. 250, 1871, affirming the judgment of the district court.) On the other hand, in those states where magistrates have by statute the power of adjournment, there a United States commissioner may let to bail pending the proceedings against the accused. (*United States* v. *Rundlett*, *supra*.)

By the statute of Missouri, "a magistrate may adjourn an examination of a prisoner pending before him, from time to time, as occasion requires, not exceeding ten days at one time." (Wagner's Statutes, p. 1075, sec. 88.) In this case the commissioner adjourned the examination for nineteen days, and ordered the accused to find bail to appear before him at that time. This was an order not only without authority of law, but contrary to law. He could not lawfully require the accused to find bail in pursuance of it; and a bond executed to avoid being imprisoned for the nineteen days, when the statute limits the period to ten days, is without any binding obligation. It is immaterial that in this instance the accused asked for the continuance. His consent could not confer jurisdiction or power to make the order; nor does it estop him or his sureties to set up the invalidity of the recognizance executed to comply with it.

REVERSED.

NOTE.—As to the power of justices of the peace to adjourn examination and take a bond pending a continuance, see *Potter* v. *Kingsbury*, 4 Day (Conn.), 98, 1809. This case affirmed the power, "but the court," says WOODRUFF, J., in the *United States* v. *Case*, 8 Blatchford, 251, "refer the power solely to statute." The only statute referred to by the court is one in these words: "No man shall be imprisoned if he will give sufficient security, bail, or mainprize, for his appearance," etc. The case treats the justice as a court of inquiry, with the incidental power to adjourn for the purpose of enabling the public or the prisoner to obtain

witnesses. But compare *United States* v. *Case*, *supra*, with which it seems difficult to reconcile it.

As to the limited powers and jurisdiction of justices of the peace in Missouri: *State* v. *Metzger*, 26 Mo. 65; *Williams* v. *Bower*, *ib.* 601.

Haskins v. Harding, *et al.*

1. Under the statutes of Missouri, the remedy of a judgment creditor of an insolvent *manufacturing and business* corporation to enforce the personal liability of stockholders is by *suit*, and not by *motion*. (1 Wagner, St. of Mo. p. 336, sec. 13.) As to certain corporations, the statute gives such a remedy by *motion*. (1 *Ib.* p. 291, sec. 11.)
2. Under the statutes of Missouri, it is a condition of the right of a creditor of an insolvent corporation to enforce in a *summary manner* a liability against stockholders personally, that the creditor shall have brought suit against the corporation within *one year* after his debt became due. Accordingly, where the plaintiff brought suit against the corporation on the debt in the state court within the year, and took a non-suit, and within a year thereafter, but more than a year after his debt fell due, brought a new suit in the federal court and recovered judgment, it was held he was barred by lapse of time of the right to enforce a *summary* personal liability on the part of stockholders.
3. Whether the one year's limitation would apply if creditors of the corporation should bring a suit in equity to enforce against stockholders' payment of their subscriptions for their stock, *quære?*

(*Before* Dillon and Treat, JJ.)

Insolvent Corporations.— Individual Liability of Stockholders.— How Enforced.— Missouri Statutes Construed.

The plaintiff is a judgment creditor of "The Cambridge Gas Stove and Boiler Company," and files his motion for execution against certain stockholders in that company. The motion is based on section 11, chapter 62, of the General Statutes of Missouri. (1 Wagner's Statutes, page 291, section 11.) This chapter relates to the general powers and

liabilities of corporations in the state of Missouri, and the eleventh section is as follows: —

"If any execution shall have been issued against the property or effects of a corporation, and there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount paid thereon; provided, always, that no execution shall issue against any stockholder except upon an order of the court, made upon motion in open court, after notice to the persons to be charged; and upon such motion, the court may order execution to issue accordingly."

The constitution of the state contained a provision to this effect: "*Article* 8. *Section* 6.—Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon in a further sum, at least equal in amount to such stock." After the plaintiff's judgment was obtained, this provision of the constitution was amended to read as follows: "*Article* 8. *Section* 6.—Dues from private corporations shall be secured by such means as may be prescribed by law; but in no case shall any stockholder be individually liable in any amount over and above the amount of stock owned by him or her." This amendment went into force December 12, 1870.

Plaintiff's motion sets out that on the 12th day of November, 1870, he recovered a judgment in this court against the Cambridge Gas Stove and Boiler Company; that thereon two writs of execution have been issued against the company and returned, "no property;" that the judgment remains wholly unsatisfied, and that certain persons — Harding, Pope, and others (naming them, and the amount of stock they respectively own) — were, at the time the indebt-

edness to the plaintiff was created, and at the time his judgment was recovered, and are at the present time, stockholders in the said company, and that none of said stockholders have paid for their stock, and are severally liable for an amount equal to the amount of stock owned, and the amount unpaid thereon. Wherefore, the plaintiff moves for an execution against the stockholders, to enforce a personal liability to him so far as necessary to satisfy his judgment. Notice of this motion having been duly served upon the stockholders, they have appeared, and resist the application on several grounds: —

1. They claim that said section 11 of chapter 62 (Wagner's Stat. 291) has no application to the class of corporations to which the said company belongs; but that their liability is specifically provided for by section 13 of chapter 69 of General Statutes (Wagner's Stat. 336), and if so, then they further insist that such a *motion* as the plaintiff makes is not authorized by it, but that any liability on their part must be enforced *by suit.* And they also insist that the plaintiffs' action against the company was not brought within the one year required by that section. This section (section 13, chapter 69, relating to "Manufacturing and Business Corporations") is as follows: "No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this charter (and it is admitted that the said corporation was formed under this charter), which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within *one year* after the debt shall become due; and no *suit* shall be brought against any stockholder who shall cease to be a stockholder in any such company for any debt so contracted, unless the same shall be commenced within two years from the time he shall cease to be a stockholder in this company, nor until an execution shall have been re-

turned unsatisfied in whole or in part." (Wagner's Stat. 386, section 13.)

The facts relating to the time the plaintiff's suit was brought against the company are these: His note against it fell due June 27, 1867, and he brought suit thereon in the state court March 20, 1868, against the corporation, which defended, and on the trial the plaintiff took a nonsuit and then brought his action in this court September 18, 1869, and recovered judgment November 12, 1870.

The stockholders also insist: 2. That this court, not having, by rule, adopted the above-mentioned special provisions of the state statutes as to enforcing the individual liability of stockholders, has no power to grant the motion or make the order asked for by the plaintiff.

It is admitted by stipulation that the persons named in the motion are stockholders, as stated therein, and that they have only paid twelve and one-half per cent upon the par value of the shares of stock owned by them respectively. It is also admitted that the corporation debtor was formed under the seventh article of chapter 69 of the General Statutes of 1865. (Rev. Statutes, 1865, p. 367; 1 Wagner's Statutes, 332.)

Glover & Shepley, for the motion.

Chester Harding, Jr., & W. S. Pope, for the stockholders.

DILLON, *Circuit Judge.*—I am inclined to the opinion that a non-resident creditor of a Missouri corporation who has obtained judgment in this court is entitled to the same or similar remedies, by execution or otherwise to enforce it, that creditors have who obtain like judgments in the state courts, and that it is not indispensable or necessary in order to give this right that there should be a rule of court adopting those portions of the state statutes which provide the manner in which the individual liability of the stockholders

shall be summarily enforced. Whatever doubt there might be upon this subject seems to be removed by the act of June 1, 1872. (16 Stats. at Large, secs. 6 and 7.) But under the view we take of the case it is not necessary for the court now to give any opinion upon this question.

Admitting, then, for the purposes of this case, that the plaintiff is entitled to all the remedies and processes for enforcing payment of his judgment that he could have if he were in the state court, we are thus brought to the question whether his motion for an execution against the stockholders is well taken. It will be observed that he proceeds by *motion* and not by suit, and his motion is confessedly founded upon section 11 of chapter 62 of the General Statutes of Missouri (Wagner, p. 291, sec. 11). This section is copied in full in the statement of the case. If the provisions of the section apply to the class of corporations to which "The Cambridge Gas Stove and Boiler Company" belonged—that is to say, if they apply to "Manufacturing and Business Corporations," such as are provided for by chapter 69 of the General Statutes (Wagner, 332), the plaintiff, it seems to me, brings his case within its requirements, and as against any objections which the stockholders have made, would appear to be entitled to the order he seeks; but does the above-mentioned section 11 of chapter 62 apply to manufacturing and business corporations organized under chapter 69? Chapter 62 relates to the general powers and liabilities of private corporations, and it is in this chapter section 11 occurs. Chapter 63 relates to railroad companies; chapter 64 to plank-road companies; chapter 65 to telegraph companies; chapter 67 to eminent domain; chapter 68 to savings banks and fund companies, and chapter 69 to manufacturing and business companies. It is admitted that the corporation debtor to plaintiff was organized under this chapter. The thirteenth section of this chapter makes specific provisions in relation to the personal liability

of stockholders in companies formed under that chapter. This section is as follows: "No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this chapter which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company for any debt so contracted, unless the same shall be commenced within two years from the time he shall cease to be a stockholder in such company, nor until an execution shall have been returned unsatisfied, in whole or in part." (1 Wagner, p. 336, sec. 13.)

General provisions (such as section 11 in chapter 62) must give way to specific provisions (such as section 13 in chapter 69) inconsistent with the more general expression of the legislative will. This is a familiar principle, and it is undeniable that, so far as there is any conflict between section 11 and section 13 above named, the latter exclusively applies to the corporations and stockholders to which it refers. And the legislature having undertaken to cover all the ground that is embraced in the more general provision, it is perhaps equally clear that section 13 of chapter 69 alone applies to all companies formed under chapter 69, of which the corporation concerned in this case is one.

This being so, has the plaintiff brought himself within the requirements of section 13? We think not. He proceeds by motion, but no such mode of procedure is authorized by this section; but, on the contrary, it contemplates and requires that the proceeding to enforce the personal liability of the stockholder shall be by "suit brought against" him as such stockholder, to be commenced within two years from the time he ceases to be a stockholder. This is apt language to describe a proceeding by suit, but

not one by motion. On this ground, therefore, the plaintiff's application, which is by motion and not by suit, must be denied.

But if this should be regarded as too technical a view of the statutes, we are also of opinion that the motion, conceding it to be a proper remedy, must fail, for the more substantial reason that the plaintiff's suit against the company was not brought within one year after the debt became due on which his judgment was recovered. That suit must be brought within one year after the creditor's debt matures is expressly made one of the conditions of "personal liability for the payment of any debt contracted by any company formed under this chapter." (Chapter 69.)

The plaintiff's debt became due June 27, 1867, and his suit in this court was not brought until September 18, 1869 —over two years after his claim matured. He had in the meantime, however, March 20, 1868, brought suit in the state court, and on the trial, December 14, 1868, taken a nonsuit, and he claims that he had a year thereafter in which to bring a new action and to preserve the personal liability of the stockholders.

The company is the principal debtor, and under the statute the personal liability of the stockholder to the creditor is collateral; the creditor must first exhaust his remedy against the corporation. (*McClaren* v. *Franciscus*, 43 Mo. 452, 465.)

The stock in this company is transferable; and all the different provisions of section 13 are special limitations on the duration of the personal liability of the stockholder.

The debt must be one to be paid within a year, suit must be brought within a year after it falls due; and suits against stockholders who cease to be such must be brought within two years after that event.

There is no authority to import the provisions of the general statutes of limitations as to the effect of a nonsuit (2

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Wagner, 919, sec. 19) into the special limitations of section 13, in relation to the personal liability of stockholders in corporations. The general limitation statutes refer to the class of actions therein specially described in which the present proceeding is not embraced.

In view of the manifest purpose of the legislature by the special provisions limiting the duration of the personal liability of stockholders;—in view of the fact that a judgment against the corporation is essential to direct summary liability on the part of the stockholder to the creditor, we hold that the suit in which such judgment is obtained must be one which was brought within one year after the debt, in respect of which it is thus sought to make the stockholder individually responsible, fell due.

If this is a correct construction of the statute, the present motion must fail. It is argued that this limitation of one year only applies to the double liability—that is, to the personal liability for an amount equal to the stock, and not to the liability of the stockholder, as a debtor to the corporation, for his unpaid stock. Undoubtedly, under the constitutional provision then in force, the stockholder was individually liable, both for the amount of his unpaid stock, and in an additional amount equal to the amount of his stock. In section 11 of chapter 62 the execution therein provided for against the stockholder may be ordered to be issued in respect to both of these liabilities.

Without the aid of any statute, the unpaid subscriptions to the capital stock constitute a fund available to creditors who are unable to make their demands from the corporate debtor, and equity will lend its aid to enforce payment for the benefit of creditors. See *Briggs* v. *Penniman*, 8 Cow. 387; *Wood* v. *Dummer*, 3 Mason C. C. R. 308; *Ward* v. *Manufacturing Company*, 16 Conn. 593; *Henry* v. *Railroad Company*, 17 Ohio, 187; *Angell & Ames Corp.* sections 602,

608, *et seq.; Mann* v. *Pents*, 3 Comst. 415, 422; *Adler* v. *Milwaukee, etc. Co.* 13 Wis. 57; *Pettibone* v. *McGraw*, 6 Mich. 441; *Spear* v. *Crawford*, 14 Wend. 20.

The language of the 13th section of chapter 69, which, as we have above held, is the one which applies to corporations, such as the debtor corporation in this case, is, that "No stockholder shall be personally liable for the payment of any debt contracted by any company, unless suit for the collection of such debt be brought against the company within one year after the debt shall become due."

This language is certainly very broad, and extends to the personal liability of the stockholder for the payment of any debt contracted by the company. We hold, that so far, at least, as respects this summary proceeding, it bars the creditor of the right to resort to it, even in respect to unpaid subscriptions, if he has not brought his suit against the company within the year.

Whether the creditor may not have a remedy in equity against the stockholder to enforce payment for his stock, which is independent of statute provisions, and may thus escape the one year's limitation in section 13, is a question upon which we are not required to pronounce any opinion.

TREAT, J., concurs.

MOTION DENIED.

NOTE.—Construction of similar statute requiring suit against the corporation to be brought *within one year* after debt becomes due: *Fusker* v. *Marvin*, 47 Barb. 159, 1866; *Tarbell* v. *Page*, 24 Ill. 46, 1860; *Hovey* v. *Ten Broeck*, 3 Rob. (N. Y.) S. C. R. 316, 1865. See, also, *Byers* v. *Franklin Coal Co.* 100 Mass. 181, 1870.

Remedy *in equity by judgment creditor*, against stockholders, to compel payment of balance due on their several subscriptions to their stock: *Ogilvie* v. *Knox Insurance Co.* 22 How. (U. S.) 380, 1859; *Adler* v. *Manufacturing Co.* 13 Wis. 57, 1860, and cases cited.

Remedy of *assignee in bankruptcy* of an insolvent corporation to enforce unpaid subscriptions to its stock: *Payson* v. *Stoever* (Republic Insurance Company), *post*.

Jurisdiction of the United States *Circuit* Court in such case: *Payson* v. *Dietz, post.*

Effect of *change of charter* on the personal liability of the stockholder: *Payson* v. *Stoever, post; Ashton* v. *Burbank, post.*

Power of corporation to *forfeit stock,* and effect: *Ashton* v. *Burbank, post.*

BEAN, Assignee, *v.* BROOKMIRE & RANKIN.

1. Parties who sign composition deeds must do so in good faith.
2. Secret preferences paid as inducements to obtain signatures of creditors to composition deeds, can be recovered by the debtor himself, or by injured creditors, or by an assignee in bankruptcy, who represents both debtor and creditor.
3. Such recovery may be at law or in equity.
4. It is no defense to such an action that the composition deed was invalid, because not signed by all the creditors, pursuant to its terms, it appearing that the greater part of the creditors believed that the composition had been signed by all the creditors in good faith.

Composition Deeds.—Secret Preferences.—Recovery back of Money Paid by way of Illegal Preference.

THIS cause was before the court on a former appeal. (*Bean* v. *Brookmire, et. al.* 1 Dillon, 151.) After it was remanded, an answer and replication were filed, testimony was taken, the cause heard on its merits, and a decree entered in favor of the assignee for the sum of $1,436.02 and interest against the defendants Brookmire & Rankin. The bill was dismissed as to Laflin. To reverse the decree against them, Brookmire & Rankin now bring the cause here by appeal.

The plaintiff is the assignee in bankruptcy of Charles S. Kintzing, who was the successor of the firm of Charles S. Kintzing & Co., wholesale grocery merchants in St. Louis. Kintzing & Co. were largely indebted, and being unable to

go on with their business, they called, on the 15th day of February, 1869, a meeting of their creditors. Many of their local and some of their non-resident creditors were represented at this meeting, but a large number of creditors was not present. An exhibit of their affairs was made showing liabilities to the amount of $179,299.54, and assets, nominally, to the amount of $204,602.80, which last sum included $51,704.50 of suspended debts, and $65,386.69 due from "the Montana branch."

Kintzing, acting for Kintzing & Co., proposed to pay their creditors seventy cents on the dollar in six, twelve, and eighteen months, and to give notes for the installments; and a composition agreement in the usual form was prepared accordingly, dated February 15, 1869.

This agreement, after providing that upon the payment of the notes given in settlement the firm should be released from all liability, contained the following: "We have entered into this compromise with the said firm of Charles S. Kintzing & Co., after hearing and seeing a statement of their books, assets, and effects, and find that it is the best, in our judgment, that can be done for the interest of all concerned. And further, that we have full confidence in the integrity of Charles S. Kintzing, and his ability to settle up the business better than any one we could appoint; but it is further expressly agreed and understood that this composition is not to be binding upon any one, unless agreed to and signed by all of the creditors of the said firm. In witness whereof, we have hereunto set our respective names, and desire the co-operation of all of the creditors with us in this compromise."

A question growing out of this agreement was before this court in *Kintzing's Assignee* v. *Bartholew* (1 Dillon, 155). Creditors whose claims amounted to $153,558.21 ultimately signed the agreement; but creditors, over thirty in number, whose claims, mostly small, in the aggregate amounted to

$2,313.53, never signed it. The last name appearing to the agreement was that of the firm of L. E. Amsinck & Co., of New York, creditors to the amount of $32,551.65. The circumstances under which they signed it appear in the case of *Bean, Assignee*, v. *Amsinck*, recently (January, 1873) decided in the United States circuit court for the southern district of New York. 12 Am. Law Reg. (N. S.) 379.

Kintzing & Co. were indebted to the defendants, Brookmire & Rankin, merchants residing also in St. Louis, upon a promissory note for $1,436.02, dated January 4, 1869, and payable thirty days from its date.

Brookmire & Rankin refused to attend the meeting of the creditors on the 15th day of February, and declined to join in the proposed compromise, but, on the contrary, had commenced suit on their note in the state court to recover the amount thereof from Kintzing & Co. This suit was pending at the time the negotiations for a compromise were going on. A committee of creditors waited on them to induce them to unite with the rest, but they refused, saying that they had no confidence in Kintzing, and that they thought they could collect the whole amount of their debt.

The next to the last name appearing to be signed to the composition agreement is that of the firm of Brookmire & Rankin, purporting to be creditors of Kintzing & Co. for $1,436.02. The defendants' names were affixed to the agreement by Sylvester H. Laflin, on the 17th day of March, 1869, under the circumstances stated in the opinion of the court.

On the same day (March 17), Kintzing enclosed compromise notes to various non-resident creditors representing that his articles of compromise had been completed. The compromise notes matured on the 18th day of August. Kintzing made a voluntary assignment, under the state law, and on the 17th day of September, 1869, was proceeded against

in bankruptcy, and such proceedings were had that the plaintiff was appointed his assignee.

The present suit is brought to recover of the defendants the $1,436.02 paid to them on the 17th day of March, with interest. The substantial nature of the bill is stated in this case as reported in 1 Dillon, 151. The answer admits the payment, but denies the imputed fraud and all liability to account for or return the money. As before stated, the court entered a decree for the assignee, and the defendants, Brookmire & Rankin, appeal. No appeal is taken from that part of the decree dismissing the bill as to Laflin.

Edmund T. Allen, for the assignee (appellee).

G. M. Stewart, for Brookmire & Rankin (appellants).

DILLON, *Circuit Judge.*—Kintzing was embarrassed, and on the 15th day of February, 1869, called a meeting of his creditors at his place of business in St. Louis. The defendants refused to attend. The creditors present, after an exhibit of his affairs, agreed to the proposal to take seventy cents on the dollar in notes at six, twelve, and eighteen months, without interest, and a composition article to that effect was drawn up. This was to be signed by all his creditors, and contemplated placing all upon an equal footing. This appears upon its face.

By the middle of March following this agreement had been signed by the great bulk of the creditors in number and amount. Those who had not signed it were the defendants; also, Amsinck & Co., who were creditors for over $32,000; Bartholew, Lewis, & Co. (defendants' local bankers — see 1 Dillon, 155), and sundry small creditors, over thirty in number, and whose claims in the aggregate amounted to something over $2,000.

It was known generally to the creditors in St. Louis that the defendants had not acceded to the compromise pro-

posed, and that they declined to do so. The defendants had, indeed, made known their refusal to a delegation of creditors who had waited upon them and urged their concurrence. Not only had they thus refused, but they had a suit upon their note pending against Kintzing & Co. in the local courts. Kintzing found that the claim of the defendants stood in the way of completing the desired arrangement, and that the defendants must in some way be satisfied, or their names procured to the composition agreement. He pursued this course: He procured from Bartholew, Lewis, & Co., or drew upon his account at the bank, the full amount of the defendants' note, placed the money thus obtained in a package and left it at the bank, with directions to deliver it to Sylvester H. Laflin. He then requested Laflin (a friend of his, and a distant relative of Brookmire's) to act for him in negotiating with the defendants. He directed Laflin to call upon Bartholew, Lewis, & Co. for a package of money, and then go to the defendants and do the best he could with them. On the 17th day of March, 1869, Laflin accordingly obtained from Bartholew, Lewis, & Co. the package of money Kintzing had provided for him; he went at once to the defendants' store; said he had called to pay or take up the Kintzing note; was informed it was at the court house, and then requested that it be sent for, which was done. The note being produced, he made an appeal to the defendants to throw off part of their demand, saying (according to the weight of testimony) that the money had been raised by himself and Kintzing's friends, or by the latter, to help him through, and he wanted the defendants to make it as easy as possible. There is no evidence that this statement is true in point of fact, and Laflin denies that he stated that he had contributed to raise the money. Upon the proofs we find that the money was Kintzing's, and that no part of it had been furnished by any one else. Defendants refused to make any substantial de-

duction, but at length threw off one month's interest and agreed to pay the costs of court. The money was handed by Laflin to the defendants and counted by their bookkeeper, who made an entry at the time in the books of the defendants to the effect that the note had been "sold" to S. H. Laflin.

As to what occurred at this time there is among the witnesses on some points much forgetfulness and conflict. But certain it is that when the note was finally delivered to Laflin (which was at the time he paid the money) it contained this material indorsement made upon it at Laflin's request by Rankin, one of the defendants: "We authorize S. H. Laflin to sign for us. Brookmire & Rankin."

The court is obliged to find upon the evidence, and does find, that this referred to the composition agreement, and that it authorized Laflin to sign that for the defendants. With this indorsement upon the note it was delivered to Laflin, who, upon the same day, took it to Kintzing and signed the composition agreement, with the words, "Brookmire & Rankin, $1,436.02," without indicating on the paper that it was signed by him as their agent.

Just underneath the name of the defendants appears the name of the firm of Amsinck & Co., signed by F. A. Reuss & Co. as their attorneys, for the sum of $32,550.65. These two were the last signatures ever procured to the agreement. On the same day, March 17, Kintzing wrote various non-resident creditors to the effect that his compromise was "completed," and enclosed notes pursuant to the composition agreement. The creditors received these notes in settlement, and Kintzing continued in business without interruption or disturbance for the next six months. His failure to meet any of his compromise paper called attention to his affairs, and the result was an assignment, and, subsequently, proceedings in bankruptcy against him.

It is a fair deduction from the testimony, that the credit-

ors generally, in good faith, supposed the compromise had been fully completed, and were not aware that a portion had never signed it, nor were they aware of the circumstances under which the defendants and a few others had received the full amount of their debts, or of any fact which made the composition invalid. During these six months Kintzing seems to have wasted or squandered the assets, and very greatly impaired his ability to pay his debts. None of the composition notes were ever paid.

Under the circumstances, the question is, Are the defendants liable to the assignee in respect to the money so paid to them by the bankrupt through the agency of Laflin?

And first, as to the form of the action.

We decided on the former appeal (1 Dillon, 151), that equity had jurisdiction, although it might be true that the assignee could have sued at law. Upon the authorities there can be no doubt of the correctness of this view, and the point need not further be discussed. Adams Eq. 180; *Mare* v. *Sandford*, 1 Giffard, 295; *Jackman* v. *Mitchell*, 13 Vesey, Sr. 581; *Cockshot* v. *Bennett*, 2 Term R. 763; *Constantein* v. *Blacke*, 1 Cox Ch. Cases, 287.

Next, as to the merits of the cause.

The defendants made the endorsement on the note: "We authorize S. H. Laflin to sign for us," and it was under authority thus given that he signed their name to the composition agreement. The evidence favors the view that the defendants at first objected to making this indorsement, and finally did it without much reflection, and upon Laflin's assurance that it would be all right and he would answer that the note should never come back or give them any further trouble. They did not seek Laflin or Kintzing, but were standing aloof from the proposed arrangement for a compromise and pursuing their own remedy against their debtor. True, the circumstances of the debtor were such

that they could not obtain payment under a judgment against him which would not be liable to be defeated by the bankrupt act; still we have felt that their passive conduct in this matter hardly deserves the warm indignation which it has called forth from the assignee's counsel.

A creditor is not bound to accede to a compromise, nor is he legally censurable merely because he refuses to unite with others; nor is he morally censurable if his refusal proceeds from a want of confidence in the debtor. And this seems to have been the case of the defendants; and if they had received the money in payment of their note, not knowing it was Kintzing's, and believing it to be that of his friends, and had merely surrendered the note, perhaps they could have retained it, or, though knowing it was Kintzing's, they could not be made to refund it, if he was not thrown into bankruptcy within four months thereafter. (*Bean* v. *Brookmire*, 1 Dillon, 24.)

But the defendants, unfortunately for them, were induced to empower Laflin to sign for them the composition agreement, and he did so. And the proposition must be true that the act of Laflin, thus authorized, is the same in legal effect as if the defendants had themselves signed the agreement with their own hands. It must be taken, then, that the defendants did sign the composition agreement, and that they agreed to do so as part of the transaction in which they received, less a trifling deduction, the full amount of their debt.

The rules of law respecting the good faith to be observed by all who unite in a composition agreement are well known and well settled, and rest upon the soundest policy and upon the clearest principles of equity, commercial morality, and fair dealing. The temptation to obtain undue or secret advantages is so great, that the necessity for the severe rules which have been declared by the courts to repress it, is undeniable. All must be open and fair. If a creditor, ap-

pealed to by his debtor, makes it a condition of his uniting in a composition, that he shall have any advantage not enjoyed or made known to the others, the transaction cannot stand either at law or in equity. It is a fraud upon creditors, and they can avoid it. It is treated as oppression or duress towards the debtor, and he may defend against any promise to pay made under such circumstances; or, if he has actually paid, he may recover back the amount, as the law does not consider the parties as being in *pari delicto*, nor regard the payments thus made as voluntary, and allows such recovery on grounds of public policy. (*Breck* v. *Cole*, 4 Sand. S. C. R. 79; *Pinneo* v. *Higgins*, 12 Abb. Pr. R. 334; *Atkinson* v. *Denby*, 6 Hurl. & Norm. 778; on appeal, 7 *ib.* 935; approving, *Smith* v. *Bromley*, Doug. 696, note; *Clay* v. *Ray*, 17 Com. B. 188; *Leicester* v. *Rose*, 4 East, 372; *Jackman* v. *Mitchell*, 13 Vesey, Sr. 581; *Knight* v. *Hunt*, 5 Bing. 432; *Bradshaw* v. *Bradshaw*, 9 M. & W. 29; *Wood* v. *Barker*, Law Rep. 1 Eq. Cases, 139; *Howden* v. *Haigh*, 3 Perry & Davidson, 661; S. C. 11 Ad. & E. 1033; *Higgins* v. *Pitt*, 4 Exch. 322; *Wells* v. *Girling*, 1 Brod. & Bing. 447; S. C. 4 Moore, 78; Matter of Hodgson, 4 DeGex & Sm. 354; *Mallalien* v. *Hodgson*, 16 A. & E. 689; *Cullingworth* v. *Loyd*, 2 Beavan, 385.)

Aside from the question as to the effect of all not signing, presently to be noticed, it is incontestible that if the defendants, with one hundred cents on the dollar in their pockets, yet signed an agreement with the other creditors that they would take seventy cents on the dollar in the future, this would be a fraud which would give a right of action both to the debtor and to the creditors thereby injured. And the assignee in bankruptcy represents both the rights of the brnkrupt and of creditors who have been defrauded. (Bankrupt act, sec. 14; *Allen, assignee*, v. *Massey*, 1 Dillon, 40; affirmed in supreme court; *Bradshaw* v. *Klein*, 7 American Law Register (N. S.), 505; *Knowlton* v.

Moseley, 105 Mass. 139; *Bean* v. *Amsinck, & Co.* 12 Am. Law Reg. (N. S.) 379, and note of Judge *Redfield*.)

Now, with their debt substantially paid in full, the defendants signed, or authorized their names to be signed to, the composition agreement: and hence they are liable to the assignee unless there is some special ground of defense.

The defense relied on may be thus stated: By the terms of the composition agreement it is not to be binding upon any creditor unless it shall be signed by all; confessedly it was not signed by all, hence it never became a completed or effectual agreement, and therefore it was incapable, in the nature of things, of working any fraud upon the other creditors. And this position is sought to be strengthened by the argument that the defendants' conduct in signing the agreement in fact worked no fraud upon the creditors, because, at most, only one firm signed it afterwards, and there is no evidence that any of the creditors saw it or knew of it after the defendants' signature was placed upon it. We are compelled, however, to differ with counsel upon this point. It seems to us quite clear upon the proofs that the compromise would never have been regarded as completed without the defendants' signature. Other creditors knew they had refused to come in, knew they had a suit pending, and it is hardly probable that they would have accepted compromise notes and allowed Kintzing to proceed for six months, as if the composition agreement had been completed, if the transaction which led to the placing of the defendants' name to the paper had not taken place. Undoubtedly the local creditors were given to understand that the defendants had at length yielded, and come in with the rest, and the foreign creditors, as we have seen, were, on the same day that the defendants' name was placed upon the agreement, notified that it was completed, and they acted upon the truth of this statement, and received notes and gave time of payment in accordance with the

terms of the composition article. We cannot agree, therefore, that the defendants' conduct has been innocuous; that it has, in fact, produced no injury. But still, the legal point above stated recurs; how can it be predicated of an instrument which by its own terms never became complete or binding, that it could operate to defraud or injure others? Plainly stated, the position of the defendants is this: The complaint is that we signed an agreement by which creditors have been defrauded; but how can an agreement which never became binding, operate to defraud or injure any one?

We have felt the force of this objection and own to some difficulty in satisfactorily answering it. Precisely the same point was made by Amsinck & Co. in the case of this plaintiff against them, and it was overruled by Judge BLATCHFORD, on the ground that the defendants having acted under the agreement were estopped to deny its validity.

In this case we answer the objection as follows:—

1. The defendants' signature to the agreement having misled and injured other creditors, the defendants as against them are estopped to deny its validity.

2. The receipt of the debt in full, accompanied by an agreement to sign the composition article, was fraudulent, *ab initio*, and gives to the assignee, as representing creditors, the right to recover in respect thereto. See *Alsager* v. *Spalding*, 4 Bing. N. C. 407, and cases cited, *supra*.

3. The assignee represents as well any right of action the bankrupt would have had if bankruptcy had not supervened.

And as the defendants refused to take less than the full amount of their demand, and on receiving that actually did agree to sign the composition articles, or authorized them to be signed, it must be taken that the real contract between them and Kintzing, through his agent, was: "If you will pay us in full we will sign the compromise agreement,"

and if so, Kintzing would have had a clear right to recover back the amount paid, though the composition may have failed, and this right has devolved upon his assignee in bankruptcy. (*Atkinson* v. *Denby*, *supra*, and other cases above cited.)

The decree appealed from is therefore affirmed.

AFFIRMED.

NOTE.—As to the presumption of law that all creditors who sign a composition deed are ignorant of any fact that would invalidate it, see *Bean* v. *Amsinck*, 12 Am. Law Reg. (N. S.) 379; *Partridge* v. *Messer*, 14 Gray, 180, 1859; *Sadler & Jackson, ex parte*, 15 Vesey, Jr. 59, 1808; *Coleman* v. *Waller*, 3 Young & Jervis, 212, 1829; *Pinneo* v. *Higgins*, 12 Abb. Pr. R. 343, 1861; *Curran* v. *Munger, et al.* 6 Bankr. Reg. 33.

As to the right the assignee to recover simply as representing the bankrupt: *Wood* v. *Barker*, Law Rep. 1 Eq. Cases, 139; *Alsager, et al. assignees*, v. *Spalding, et al.* 4 Bing N. C. 407, 1838; *Smith* v. *Cuff*, 6 Maule & Selwyn, 160, 1807; *Turner* v. *Hoole, Dowling, & Rowland*, N. P. C. 27; S. C. 16 E. C. L. R. 418; *Cockshott* v. *Bennett*, 2 Durn. & East, 763, 1788; *Howden* v. *Haigh, et al.* 3 Perry & Davidson, 661; S. C. Ad & E. 1033, 1840; *Higgins* v. *Pitt*, 4 Exch. 322, 1849; *Breck* v. *Cole*, 4 Sandf. S C. R. 79; *Carroll* v. *Shields*, 4 E. D. Smith, 466.

Notes or securities fraudulently obtained cannot be enforced. *Wells* v. *Girling*, 1 Broderip & Bing. 447; S. C. 4 Moore, 68, 1819; *Constantein* v. *Blacke*, 1 Cox Ch. Cases, 287, 1786; *Jackman* v. *Mitchell*, 13 Vesey, Sr. 581, 1807; *Exparte, Royston Oliver and William Thompson, In the Matter of James and Joseph Hodgson*, 4 DeGex. & Sm. Rep. 354; *Mallalien* v. *Joseph Hodgson, et al.* A. & E. 689, 1851.

As to right of the debtor, if not bankrupt, to recover back money extorted from him in order to induce a creditor to sign a composition agreement: *Atkinson* v. *Denby*, 6 Hurlstone & Nor. 778; S. C. on appeal, 7 H. & N. 985, 1862; *Clay* v. *Ray*, 17 Com. Ben. N. S. 188; *Smith* v. *Bromley*, 1 Doug. 697, note, 1760; Adams Equity, 180; *Mare* v. *Sandford*, 1 Giffard, 295, 1859; *Partridge* v. *Messer*, 14 Gray, 180, 1859; *Doughty, et al.* v. *Savage*, 28 Conn. 146, 1859; *Pinneo* v. *Higgins*, 12 Abb. Pr. R. 334, 1861; *O'Shea* v. *Collier White L. Co.* 42 Mo. 387, 1868.

As to forfeiture by creditor of entire demand if guilty of fraud, see *In the Matter of Cross*, 4 DeGex. & Sm. R. 364, 1848; *Howden* v. *Haigh*, 3 Perry & Davidson, 661; S. C. 11 Ad. & E. 1033, 1840; *Mallalien* v. *Hodgson*, 16 A. & E. 689, 1851; *Doughty* v. *Savage*, 28 Conn. 146, 1859; Bankrupt Act, last clause, sec. 35; *Carter, et al.* v. *McClaren*, 2 Scotch Appeals, 120, 1871.

In re Murrin, Bankrupt.

A wife possessed of a separate estate, secured to her by an ante-nuptial settlement, obtained in 1869, a policy of insurance upon her life, payable upon her death *to her husband.* She paid the premium for a year out of her own estate. Before the year expired her husband was adjudicated a bankrupt. Out of her own estate she paid the premium for the two following years, 1870 and 1871, and before the next premium fell due she died; and the question arose between the husband, and his assignee in bankruptcy, which was entitled to the proceeds of the policy: *Held,* considering the nature of the contract of insurance and the obvious intention of the wife, that the assignee had no right to the proceeds, but that they belonged to the husband.

(*Before* Dillon, *Circuit Judge.*)

Bankrupt Act.—Life Insurance Policy, Paid for by the Wife for her Husband's Benefit.—Contest between Assignee and Husband for Proceeds of Policy.

Bankruptcy: This cause is brought here to revise an order of the district court for the eastern district of Missouri, overruling the demurrer of the assignee in bankruptcy to the petition of James Murrin, one of the bankrupts, and directing the assignee to pay the bankrupt Murrin the proceeds in his hands of two policies of life insurance, less the sum paid by him for costs and expenses of collection.

The petition thus demurred to is as follows:

"To the Hon. Samuel Treat, judge of said court:

The petition of James Murrin, one of the said bankrupts, respectfully represents, that a petition in bankruptcy against your petitioner and said Bolivar Owen, was filed in this court on the 30th day of November, 1869. That a hearing was had and an adjudication of bankruptcy entered on said petition on December 10, 1869. That on December 28, 1869, your petitioner and said Owen filed their schedules as required by law. That on January 18, 1870, Charles Green was elected and appointed assignee in bankruptcy of

said Owen and Murrin as partners and individually. That Sarah E. B. Murrin was the wife of your petitioner, James Murrin, and that by a marriage settlement made previous to their intermarriage, all the property and estate of said Sarah was settled and secured to her own separate use and behoof, so that the said James had no right or interest therein, nor title nor claim thereto, nor to any portion thereof. That said separate estate was large in amount and of great value.

"That on March 17, 1869, the said Sarah made application to the Penn Mutual Life Insurance Company, doing business in this state, for an insurance upon her own life in the sum of five thousand dollars, *payable upon her death, upon proper proof, to her husband, the said James Murrin.*

"That upon said application said company issued to said Sarah a policy of insurance upon her life, in consideration of the payment by her of the annual premium of one hundred seventy-seven fifty-hundredths dollars, payable one-half in cash and one-half by note bearing interest at six per cent, payable in advance on or before the 26th April in each year during the continuance of the policy. That said Sarah, *out of her own funds*, paid the premiums required in cash and also the interest upon the notes for the years 1869, 1870, 1871 in advance. That the said Sarah *died* on the 19th day of January, 1872.

"That your petitioner did not pay any of said premium sums, nor were the same paid out of any funds or property in which he had any interest legal or equitable, nor did he suppose that he had any interest or title to said policies either legal or equitable which could pass to his assignee, in bankruptcy, and for this reason he did not enter said policy in his schedule of assets belonging to him at the date of the petition filed in this court. That after the death of the said Sarah and the money due on said policy became payable, the said Green, assignee in bankruptcy of your petitioner

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and said Owen, applied to your petitioner, required him to set over said policy and the sum secured thereby to him as assignee; and your petitioner supposing that said demand was legal did give to said Green an order for the payment of the sum due upon said policy as follows:

"'Policy No. 9,199, on life of Sarah E. B. Murrin, I, James Murrin, the person in whose favor the above policy was issued, make no claim for the sum thereby insured, or any part thereof, or any interest therein, and do request and direct the Penn Mutual Life Insurance Company to pay the same to Charles Green, my assignee in bankruptcy, who is entitled to the amount. Witness my hand and seal the 7th day of May, 1872.

"'JAMES MURRIN [seal].'

"And the said Green, as assignee by suit at law in the St. Louis circuit court, recovered judgment against such company on December 11, 1872, and said judgment for the sum of $4,938.05 was duly satisfied and paid to said Green on the 26th day of December, 1872.

"[Precisely the same allegations are made in respect to another policy issued to the said Sarah by the Connecticut Life Insurance Company on the 29th day of April, 1869, for the sum of $5,000 payable at her death, to the petitioner, her husband, upon which the said Green as assignee, collected May 11, 1872, the sum of $4,948.57.]"

The petition then continues:

"Your petitioner further represents, that the orders for collection of the amounts due upon said policy were without consideration; that your petitioner had no title or interest legal or equitable in said policies on the 30th November, 1869, the date of the filing of the petition in bankruptcy, which could pass to his assignee by virtue of the act of Congress to establish a uniform system of bankruptcy throughout the United States, and he is informed by counsel and

believes that the sums of money collected by said Green upon said policies belong to your petitioner and to his creditors, becoming such since the filing of said petition in bankruptcy.

"In consideration of the premises, he prays that said Charles Green, as assignee, may be made to pay over to your petitioner the said sums of $4,933.05 and $4,948.57, less the costs, charges, and expenses by him incurred in collecting the same, and that your petitioner may have such other and further relief as to the court may seem meet."

Lackland, Martin, & Lackland, for the assignee (appellant).

C. C. Whittelsey, for the petitioner.

DILLON, *Circuit Judge*.—The wife of the petitioner being possessed of a separate estate, secured to her by an antenuptial marriage settlement, applied in the spring of 1869 for two policies of insurance of $5,000 each, upon her life, *payable upon her death to her husband.* They were issued accordingly, and she paid the premiums for one year, one-half in cash, and one-half by note. Before the year expired her husband was adjudicated a bankrupt. Out of her own estate she paid the premiums for the two following years, 1870 and 1871, and before the next premium fell due she died. The question is, whether the assignee as against the bankrupt, is entitled, for the benefit of the estate, to the proceeds of the policies. The assignee does not claim that his right is strengthened by reason of having obtained, in the manner stated, the actual possession of the proceeds, and the only contest is as to the respective legal or equitable right of the assignee and bankrupt thereto.

Counsel on both sides, in their well considered briefs, have argued many points which, though pertaining to the general subject of life policies for the benefit of others, are,

nevertheless, not necessarily involved in the decision of the case.

The counsel for the assginee claims that at the date of the bankruptcy of the husband, November 30, 1869, the husband had a right of property in the policy (which it is contended is a *chose in action*) of such a nature that it vested in the assignee by virtue of the adjudication in bankruptcy. (Bankrupt act, sec. 14.) Under this section, property and rights which are acquired by the bankrupt after the commencement of the proceedings in bankruptcy do not vest in the assignee; and to make good his claim the assignee must show that the right to the benefit of the policy was one which not only existed in the husband at the time he was proceeded against in bankruptcy, but is one of such a nature as to vest in the assignee as of that time, by virtue of the provisions of the bankrupt act. This act should receive such a construction as accords with its well known purpose, which is, that if an insolvent debtor will surrender all *his* property (not exempt) for distribution among his creditors, he may, on the terms provided in the act, have his discharge. If the wife's death had happened before the bankruptcy, there being no statute protecting the husband's rights under the policy, the right to collect and hold the money would, it may be admitted, pass to the assignee. But her death did not happen until over two years afterward, during which time the wife continued to pay the premiums. It is admitted that she could not have been compelled to pay them, either by the husband, or by the assignee. Her payment of them proceeded purely from her bounty. It is certain, to a practical intent, that if she had not paid the subsequent premiums, the first payment, made before the bankruptcy, would have been of no benefit, either to the assignee or to the husband, for she did not die during the year. It is also certain, to a practical intent, that, had the last premium not been paid, there would have been no

proceeds here about which to litigate. Her intention, her object, in making these payments, in virtue of which the policy was kept *in esse*, must have been to make provision for her husband; and what equity, let me ask, have creditors, or the assignee representing them, to thwart the purpose which she had in view, and for which she paid *her* money — money to which they had no claim? The assignee, if it be conceded that he could have done so for the benefit of the estate, which I do not admit nor decide, took no steps to pay the premiums, but asks the benefit of those paid by the wife. It is inconceivable that she made, or intended to make, the payments for the benefit of the assignee, and she doubtless died in the confident belief that she had made provision for her husband.

Without discussing the questions which have been argued at the bar as to the nature and extent, before the death occurs, of the interest of a person designated by the bounty of another as the one to whom a policy is ultimately to be paid, I am quite confident that the husband, at the time of his bankruptcy, had no such interest in these policies as to give the assignee the right to retain their proceeds against manifest intention and purpose of the wife.

Could the assignee, as against the wish of the wife, have said, "I demand the policy, and intend to keep up the premiums for the benefit of the estate?" If it were necessary to answer this question, it would seem that he had no such right, and that she could properly say, "This is a matter of my own, a provision originating in my bounty, one upon which my husband's creditors have no claim, and with which they have no right to interfere." But the assignee took no such steps; on the contrary, he allowed, or did not prevent the wife from making the payments which kept the policy alive; and I rest my judgment against him on the broad ground, that, under the circumstances of the case, the creditors, for whose benefit the money is sought, have not

the shadow of a shade of equity to it, nor to defeat the provident and just provision which the wife intended to secure for her husband, not for them. The policy was kept up by her for the benefit of her husband after her death, not for the benefit of his creditors before his bankruptcy. The district judge, in deciding the case, seized the considerations which control it, when he remarked: "Looking at the nature of the contract for the insurance as being a provision by one married party for the benefit of another, and kept in force by the wife out of her separate estate without any step being taken by the assignee, her equities should be carefully regarded. The policy was for the benefit of the husband, and was kept alive by the wife after the bankruptcy, and it would be inequitable that a sum becoming payable after the bankruptcy under such a contract, should, by relation back to the time of commencement of proceedings in bankruptcy, be held to belong to the assignee. The design of such charitable acts for the benefit of a third party was not intended to be defeated by the bankrupt law, in a case like the present, where such a result would be against all equity."

AFFIRMED.

NOTE.—Right of payee or beneficiary in a life policy: See *Clark* v. *Durand*, 12 Wis. 223; *Kerman* v. *Howard*, 23 Wis. 108; *Goodall* v. *Webb*, 2 Keen, 99.

See, and compare, *Chapin* v. *Fellows*, 36 Conn. 132; *Lemon* v. *Phœnix M. L. Ins. Co.* 38 Conn. 294; *Rupert* v. *Union M. Ins. Co.* 7 Robertson (N. Y.), 155; *Glendale* v. *Proctor*, 21 Conn. 37; *Gould* v. *Emmerson*, 99 Mass. 154; *West* v. *Reid*, 2 Hare, 241; *Burridge* v. *Row*, 1 Young & C. 183; *Triston* v. *Hardy* 14 Beav. 232; *Conn. M. L. Ins. Co.* v. *Burroughs*, 34 Conn. 305; *Burroughs* v. *State M. L. Ass.* 97 Mass. 359; *Swan* v. *Snow*, 11 Allen, 224; *Mason* v. *Colburn*, 99 Mass. 342; *McAllister* v. *N. Eng. M. L.* 101 Mass. 558; *Drysdale* v. *Piggott*, 8 D. M. & G. 546; *Johnson* v. *Lewis*, 3 Giff. 194.

SCHWABACKER *v.* REILLY.

1. Since the act of June 1, 1872 (17 Stats. at Large, 196), as well as before, *original process* directed to the marshal must be *served* by that officer or his deputy, and cannot be served by a private person, although such mode of service as respects process in the state courts, may be authorized.
2. Subpœnas and notices directed to a witness or party need not, necessarily, be served by the marshal.

(*Before* DILLON and TREAT, JJ.)

Practice.—Act June 1, 1872.—*Service of Process.*

DILLON, *Circuit Judge.*—This is a civil action at law commenced in this court. Summons issued, in the usual form, in the name of the president, tested in the name of the chief justice, under the seal of the court, signed by the clerk, commanding the marshal to summon the defendant to appear in this court at the term named in the writ to answer the petition of the plaintiff filed herein. At this term the plaintiff moved for a default, for want of an answer, and on looking at the summons, we find no return of service by the marshal, or by any deputy of his, but only an affidavit of a private person, that "he executed the writ by delivering a copy to the defendant, at," etc.

We cannot grant the default. The marshal is the executive officer of the court, and he or his deputy must serve the process directed to him. It is the marshal who is commanded by the writ to serve it, and no other officer or person is authorized to perform this duty. Among the duties of the marshal as prescribed by the Judiciary Act (1 Stats. at Large, 73, sec. 27), is this: "To execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States." By the 28th section of this act, it is further provided that when the marshal or his deputy shall be a party, the process in the suit shall be directed to a disinterested person, appointed by the court,

or any judge thereof, and such person is authorized to execute and return such process.

In some of the states there are provisions authorizing original process to be served by private persons, and to make proof of such service by affidavit. In Missouri the original writ is a summons directed to the officer who is to execute it. If there is any authority in the laws of the state giving to private persons the right to make service of a writ of summons, this would not apply, under the special legislation above mentioned, to actions in this court. Nor would it apply by reason of the provisions of the act of June 1, 1872 (17 Stats. at Large, 196, sec. 5).

True, this act provides that "the practice, pleadings, and *forms and modes of proceedings* in other than equity and admiralty causes" in the federal courts "shall conform, as near as may be, to the practice, pleadings, forms and modes of proceedings" in the state courts, "any rule of court to the contrary notwithstanding." This general provision, of which the main object was to secure uniformity of practice in the two classes of courts, as far as practicable, cannot impliedly repeal special provisions of the acts of congress directing the modes of procedure and of service of process in the federal courts. A subpœna directed to a witness, or a notice directed to a party, stands on different ground, and in ordinary civil actions service of these may be made in conformity with the statute provisions of the state, and not, necessarily by the marshal.

TREAT, J., concurs.

MOTION DENIED.

NOTE.—Service of process is a "mode of proceeding" within the meaning of the act of June 1, 1872, and being so, the mode of service [not the officer by whom made] prescribed by the state law must be followed, and the power of the federal court to prescribe or substitute any other

mode is necessarily abrogated. So held by the United States circuit court, for the eastern district of Wisconsin, by Mr. Justice DAVIS and Mr. District Judge HOPKINS: 5 Chicago Legal News, 472.

Construction of above act as respects service *by publication*: *Bronson* v. *Keokuk*, *post*.

In re BRENT.

1. A creditor who has consented in writing to the discharge of the bankrupt under the fifty per cent clause, and whose consent has been acted upon and filed, has no *absolute right* to withdraw or cancel it, though such right be claimed on the day fixed for the hearing.
2. Section 29, as to what frauds upon the bankrupt act will disentitle the bankrupt to a discharge, considered.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Fraudulent Preference.—Withdrawal of Consent to Discharge.

IN Bankruptcy. Petition for review under section 2 of the bankrupt act. The facts are stated in the opinion.

Edmund T. Allen, for the opposing creditors.

Wm. C. Marshall, for the bankrupt.

DILLON, *Circuit Judge.* — 1. This is a petition to review the action of the district court, in refusing to allow certain creditors to withdraw their assent to the discharge of the bankrupt, and in overruling their specifications of the grounds of their opposition to such discharge.

Due steps were taken by the bankrupt to procure his discharge under section 29 of the act, and a time was appointed for the hearing of the application, and notice given to the creditors to appear and show cause, if any they had, why a

discharge should not be granted. The assets not being equal to fifty per cent of the claims proved against his estate, the bankrupt set about to obtain the written assent to his discharge of a majority in number and value of his creditors who had proved their claims. The written assent of the requisite number was procured and filed by the bankrupt at the time fixed for the hearing of the application for discharge. At the time fixed for the hearing, two creditors who had signed their assent to the bankrupt's discharge appeared and objected to the discharge, and filed petitions to withdraw such assent, or have it held for naught. The petition to withdraw their assent was urged upon two grounds — first, as a matter of right, irrespective of any fraud practiced upon them in granting it; second, that the assent was procured by fraud, and given under a mistake of fact.

The second ground is not established by the evidence; and as to the first ground, I am of opinion that when a creditor has once given his assent in writing, and the bankrupt has acted upon it, and other creditors have given theirs and presumptively been influenced by each other's action in this respect, and the assent of the requisite number in value and amount is obtained and filed at the hearing, that a creditor thus assenting has no *absolute right*, even on the day fixed for the hearing, to withdraw or cancel his assent in writing. I see no error in the order of the district court in refusing the prayer of the opposing creditors in this respect.

2. It is urged by the opposing creditors that the district court erred under the proofs in overruling their objections to the bankrupt's discharge. The grounds of their objections were certain payments whereby it is alleged a portion of the creditors were preferred.

The bankrupt was a country merchant, usually carrying a stock of several thousand dollars. The evidence to estab-

lish the alleged fraudulent preference mainly consisted of the examination of the bankrupt before the register. In that he says he first discovered his insolvent condition on the 6th day of March, which was after the payments were made, now claimed to have been fraudulent. It is urged by the opposing creditors that the bankrupt was insolvent before this, and that he knew or had good reason to know it, and that payments made to creditors under such circumstances, though not made in contemplation of becoming a bankrupt, and though there was no actual design to prefer, deprive him of the right to a discharge. Without going into the evidence, it must suffice to state that it does not appear that the payments in question were made by Brent in contemplation of becoming a bankrupt. I think they were made in just the opposite contemplation — when he was carrying on business, and in good faith expecting or hoping to keep along in it. These payments, with one exception of the trifling sum of twenty-six dollars, to his nephew, were made from time to time in December, January, and February, to his business creditors or on account of his business paper.

On reviewing the bankrupt's examination, it must be admitted that they were made when in point of fact his assets were not worth in cash the amount of his liabilities, and when he could not pay in money or otherwise than by borrowing, all of his liabilities as fast as they became due. But in this manner, that is, by part payments and by getting extensions, and by borrowing, and by the proceeds of sales and collections, he had for some time been keeping afloat; and I find that he made the payments in question to these various creditors in the *bona fide*, though, as it turned out, erroneous expectation that he could keep along, and with no actual design to favor or prefer those to whom such payments were made. Among the very last payments thus

made was a payment on account of creditors who are actively opposing the discharge.

There is some difficulty in construing the twenty-ninth section of the bankrupt act in respect to the kind and degree of frauds upon the act which will disentitle the bankrupt to his discharge. But I am not prepared to hold that merely for taking too hopeful a view of his affairs, and for making payments in the course of his business with the *bona fide*, though mistaken, expectation that he can keep along without going into bankruptcy, there being no actual design to favor or prefer, the intention of Congress was to deprive the party of the right to his discharge, if otherwise entitled to it. I therefore perceive no error in the action of the district court.

AFFIRMED.

NOTE.—Nature of jurisdiction conferred upon the circuit court by the second section of the bankrupt act, and what may be reviewed, see: *Woods* v. *Buckewell*, *ante*, p. 38; *Marshall* v. *Knox* (U. S. Sup. Court), 8 Bankr. Reg. 97, 1872; *Knickerbocker Insurance Company* v. *Comstock* (U. S. Sup. Court), *ib.* 145, 1872; *Morgan* v. *Thornhill*, 11 Wallace, 65; *Mead* v. *Thompson*, 15 Wall. 635; *Hall* v. *Allen*, 12 Wall. 452; *Hawkins* v. *Bank*, 1 Dillon C. C. 453, and cases cited in note.

RUDOLPH SCHULENBURG, Assignee of William Hartman, Bankrupt, Defendant in Error, *v.* GEORGE KABURECK AND CONRAD KEHLER, Plaintiffs in Error.

1. Where a joint purchase of property is made by two persons, in contravention of the bankrupt act, the recovery by the assignee in bankruptcy may be against both for the full value of all the property, though the purchasers may have been interested in different proportions.

2. What circumstances will put the purchaser upon inquiry as to the *bona fides* of a proposed sale, and the degree of inquiry that is requisite, considered.

(*Before* Dillon, *Circuit Judge.*)

Bankrupt Law.—Fraudulent Sale.—Duty of Purchaser to Make Inquiry.

Writ of error to the district court for the eastern district of Missouri.

The action was one by the assignee, under section 35 of the bankrupt act, to recover the value of property alleged to have been fraudulently sold by the bankrupt to the defendants, Conrad Kehler and George Kabureck. In their answer, the defendants admit "that on, etc., they purchased from the said William Hartman [the bankrupt], in satisfaction of a debt owing by said Hartman to the defendant, Kabureck, of $700, and of another debt owing by Hartman to the defendant Kehler, of $300, the property mentioned in the petition;" but they deny the fraud, etc., imputed to them.

All of the evidence is in the record, and it shows that Hartman, the bankrupt, was the lessee and proprietor of a boarding house, and saloon connected with it, in St. Louis; that he was indebted to various persons, and among others, to the defendants; that the defendants purchased all the property of the bankrupt in the boarding house and saloon for $1,000, which was paid for by their debts against him, unless it may be that Kehler paid $300 in money; that this was all the property that Hartman had, except money on his person; that he absconded, and that the defendants had both admitted that they made the purchase "to save themselves." The defendants, one of whom was a butcher, and the other a grocer, did business near Hartman and supplied him, the one with meat, and the other with groceries and liquors.

On the trial the defendants excepted to the instructions given by the court to the jury, and a verdict and judgment having been rendered against them, they bring the case into this court by writ of error.

F. & L. Gottschalk, for the plaintiffs in error.

Slayback & Haussler, for the defendant in error (the assignee).

DILLON, *Circuit Judge.*—That the defendant's purchase is one which cannot stand, under the bankrupt act, as against the assignee, is very clear upon the admitted facts and undisputed testimony. The judgment should not, therefore, be reversed except for errors of law, occurring on the trial, prejudicial to the defendants. On the argument two such errors are urged, which will briefly be noticed: —

1. One of the defendants paid $300 and the other $700 of the purchase money. The $700 was confessedly paid by a debt owing to the purchaser by the bankrupt, and the answer admits the same as respects the $300 paid by the other defendant, and he is concluded on this point by the admission in the pleadings. The answer, the testimony, and the bill of sale, show a joint purchase by the defendants of Hartman's property. The court charged the jury "That if these two defendants purchased the property together, the consequences resulting to the one are the same as to the other." It is urged that the court erred in this, and that the jury ought to have been allowed to find separate verdicts or amounts against the defendants, proportioned to the sums which they respectively paid for the property. But as they bought the whole property together, as a joint purchase, the instruction of the court is manifestly correct.

2. The court, in substance, also instructed the jury that the fact that the sale by the bankrupt to the defendants was out of the usual course of business, was *prima facie* evidence

of fraud, and that the law devolved upon the defendants the burden of proof to show that the sale was fair, and that they had made diligent inquiries as to the solvency of Hartman before purchasing. The objection made to this charge is to that portion which requires that they should have made *diligent* inquiries.

The degree of inquiry which devolves as a duty upon a person who proposes to make a purchase out of the usual course of the business of the seller depends upon the circumstances of the particular transaction. Such a person must, in all cases, make a reasonable inquiry as to the right of the seller to make the proposed sale. In the case before us there were other circumstances showing that the defendants' purpose was to obtain a preference, and the charge of the court must be looked at in the light of the case before it. And we think the case was such as to justify the court in saying that it was the defendants' duty to make diligent inquiry as to the right of the bankrupt to make the proposed sale. At all events, upon the facts known to the defendants, the proposed sale was in contravention of the bankrupt law, and the defendants were not prejudiced by the instruction.

The judgment is affirmed.

AFFIRMED.

NOTE.—As to degree of diligence on the part of a purchaser out of the usual course of business, see opinion of the supreme court of the United States in *Walbrun* v. *Babbitt*, December term, 1872, affirming judgment of the circuit court, 1 Dillon, C. C. 19, 24, note

DOWNING'S ASSIGNEE v. TRADERS' BANK.

1. The *bona fide* holder for value of an accommodation bill is entitled, on the bankruptcy of parties thereto, to prove as to all parties against whom the holder could have supported an action on the bill.
2. The receipt by a holder of a bill drawn by the bankrupt, but accepted for the accommodation of the drawer, of partial payment from the accommodation acceptor after the bankruptcy of the drawer, does not disentitle such holder from proving against the estate of the drawer in bankruptcy for the full amount due on the bill at the time of the adjudication of bankruptcy.
3. Section 19 of the bankrupt act, in respect to partial payments made by a surety after the bankruptcy of the principal debtor, considered.
4. A mere covenant by a creditor not to sue an accommodation acceptor does not prevent him from proving against the drawer's estate in bankruptcy.

(*Before* DILLON, *Circuit Judge.*)

Bankruptcy.—Section 19 *Construed.—Payments by Surety after Bankruptcy of Principal Debtor.*

THIS was a contest in the district court between Downing's assignee in bankruptcy and the Traders' Bank of St. Louis, and the cause is brought here by the bank to obtain a review of the decision of the district court ordering the bank to credit the sum of $4,000 on its claim against the estate.

Downing was adjudicated a bankrupt on the 9th day of December, 1869, upon a petition filed against him on the first day of that month.

On the 12th day of February, 1870, the Traders' Bank filed and made proof of a claim against the estate of Downing for $18,500, composed of three protested drafts, each drawn by Downing; one for $4,500, protested June 15, 1869; one for $6,000, protested June 26, 1869; and one for -8,000 (being the one to which the present controversy relates), protested September 7, 1869. Accompanying the

proofs of its claim, the bank filed a list of collaterals held by it.

In January, 1872, the assignee objected to the proof of claim by the bank, on the ground that it should credit the sum of $4,000, alleged to have been paid by Saunders Bros. & Co. in the manner hereafter appearing.

The objections of the assignee were, by the parties, submitted to the district court upon the following agreed statement of facts: —

"*First.* It is agreed by said parties that bankrupt on June 4, 1869, at St. Louis, Missouri, drew his draft on and directed to Saunders Bros. & Co., Boston, Mass., and thereby requested them, three months after the date thereof, to pay to the order of bankrupt $8,000, value received, and to charge to his account.

"*Second.* This draft was accepted by Saunders Bros. & Co. for the accommodation of the drawer and payee, and without any consideration from said Downing to said Saunders Bros. & Co., it being a mere loan of their name, and that bankrupt discounted and sold this paper to said Traders' Bank for value.

"*Third.* That said Saunders Bros. & Co., after said draft had been duly protested, and all parties properly made liable thereon, and after the failure of said Downing, gave certain notes to said Traders' Bank for fifty per cent of said acceptance, and then and there received from said bank the following paper, to-wit: —

"'To all persons to whom these presents shall come: The Traders' Bank, a corporation duly established by law in the state of Missouri, send greeting: —

"'WHEREAS, Edward W. Saunders, in the county of Essex, and commonwealth of Massachusetts, heretofore doing business under the style of Saunders Brothers & Company, is indebted to said bank as acceptor upon a draft, dated St. Louis, Missouri, June 4, 1869, for $8,000, drawn by William

Downing, payable in three months after date, to said Downing's order, and indorsed by said Downing, and said Saunders is unable to pay his obligation in full, and some time since offered said bank to pay it one-half the amount of said draft in two equal instalments by his notes, indorsed by John Cummings, payable in four and six months from the maturity of said draft, with interest at the rate of six per cent per annum, from maturity; now, therefore, in consideration thereof, and of the receipt by said Traders' Bank of said notes, the said Traders' Bank doth hereby covenant and agree with said Saunders, his heirs, executors, and administrators, that it will not sue him or them upon said draft, or upon any claim arising out of the same, but this covenant is without prejudice to the rights of said bank against the other parties to said draft or any person whatsoever. In witness whereof the Traders' Bank has hereto affixed its seal and caused these presents to be signed by William Taussig, its president, thereunto legally authorized, this eighth day of November, Anno Domini, eighteen hundred and sixty-nine.

"'WILLIAM TAUSSIG.'

"That said bank made this arrangement by and with full knowledge of all the parties, as to the relation that Saunders Bros. & Co. bore to said paper, and that the bank still holds the original draft. That Saunders Bros. & Co. made this arrangement with the bank without the knowledge, request, or consent, of Downing or his assignee.

"*Fourth.* The bank now presents the draft for allowance against the estate of Downing, the bankrupt, whilst Saunders Bros. & Co. seek to prove against said estate the $4,000 paid by them on the agreement of the Traders' Bank above set out. That the bank is willing to surrender all their rights to said draft to either the assignee or Saunders Bros.

& Co. on the payment of the balance of the $8,000 to them, but not otherwise."

The record recites that "the court held on the facts submitted that the Traders' Bank is entitled to recover on the draft for $8,000 named in the said agreement the amount originally due thereon, with interest and damages, less the amount paid thereon by Saunders Bros. & Co.," and ordered a reference to Lucien Eaton, Esq., the register, to "ascertain the precise amount due in accordance with this ruling." The register reported the amount due on said draft for $8,000, less the credit, required by the order of the court, to be $5,570.60, and that the entire unsecured balance due the bank from Downing's estate, including that sum, was $7,745.48, and judgment was entered accordingly.

The bank appeals, and the only ruling complained of is that by which it was ordered to credit on the draft for $8,000 the $4,000 received of the accommodation acceptor under the circumstances above set forth.

Slayback & Haussler, for the Traders' Bank.

Hitchcock, Lubke & Player, for the assignee.

DILLON, *Circuit Judge*.—This is a controversy between the assignee of Downing's estate and the Traders' Bank in respect to the bill of exchange for $8,000, of which Saunders Bros. & Co. were the accommodation acceptors for the bankrupt. The assignee claims for the estate the benefit of an alleged payment of $4,000 under the agreement of November 8, 1869, set out in the statement of the case. The draft for $8,000 matured, and was protested for non-payment, September 7, 1869. The agreement of November 8, 1869, between the Traders' Bank and Saunders recites that the bank has received of Saunders two notes of his for $2,000 each, indorsed by Cummings, due respectively in four and six months from the maturity of the draft, and in

consideration thereof the bank covenants with Saunders not to sue him on the draft; but it is provided that this covenant shall be without prejudice to the rights of the bank against the other parties to the draft or any other person. No indorsement of payment was made on the $8,000 draft, which was retained by the bank, and very shortly after the agreement of November 8th was made, and before the notes for the $4,000 which were received from Saunders, fell due, Downing was adjudicated a bankrupt.

It is not expressly admitted in the agreed statement that the notes for the $4,000 were ever paid; but this is perhaps fairly to be implied. The presumption is, that if they were paid, it was not before maturity, and consequently the payments were made after Downing was adjudicated a bankrupt.

It is plain that upon the agreed statement there is no ground to hold that the bank received the new notes of Saunders indorsed by Cummings, in absolute extinguishment or satisfaction of one-half of the amount of the draft. No indorsement to that effect was made upon the draft, nor is there any acknowledgment of part payment contained in the agreement executed at the time. On the contrary, the draft for the full amount was left in the hands of the bank, which agreed with Saunders not to sue him upon the said draft, but it reserved its rights without prejudice against all other parties. Story says that "By the law of England, and of most of the States of America, the receipt of the promissory note of the debtor for a debt is, in the absence of all other proof, treated as a conditional payment only of the debt; that is to say, if or when the note is paid." (Story on Notes, section 438.) "Where the holder receives a promissory note or bill in payment of a debt, it is not an absolute, but a conditional payment only, unless otherwise agreed by the parties, and it only suspends the right to recover until the credit has expired." (*Ib.* section 389.) And he lays

down the same rule where the creditor receives from the debtor the note of a third person; presumably, it is a conditional satisfaction, or extinguishment only. (*Ib.* section 404.) We cannot, therefore, upon the facts appearing in the agreed statement, hold that the bank took the new notes in extinguishment of $4,000 of the amount due it on the draft, or that the new notes were received by the bank in absolute payment to that extent. The presumption of law is otherwise, and the presumption is fortified by the non-indorsement of payment, and by the language of the agreement, which is a covenant not to sue, and not an acknowledgment of satisfaction or payment.

It will be conceded that from the agreed statement it can be implied that these new notes were subsequently paid; and, nothing appearing to the contrary, the presumption is that they were paid by Saunders at maturity, which, as before stated, was *after* the bankruptcy of Downing.

Conceding also, for the time, that when the bank actually received payment of the new notes for $4,000 it operated to extinguish, or satisfy *pro tanto*, the amount due on the original draft, we now proceed to inquire to what extent the bank was entitled to make proof in bankruptcy with respect to this draft? Saunders Bros. & Co. having accepted this draft for the accommodation of Downing, the drawer, the latter, as between them, was the principal debtor, they being his sureties, or incurring a liability in that nature. (Chitty on Bills, 703, 708, 718.)

Downing was the party principally and ultimately liable for the $8,000; and it is not controverted that in respect to this debt the sum of $8,000 can be proved against his estate. It is admitted on all hands that the bank can prove to the extent of $4,000; and as to the other $4,000, the only question is, whether it shall be established as a claim in favor of the bank or in favor of Saunders. In effect, the substantial controversy seems to be one between the bank and

Saunders; and so far as this record shows, it is a matter of indifference to the estate of Downing whether the allowance is to the one claimant or the other; so that the assignee, in resisting the claim of the bank, apparently occupies the position of waging gratuitously the battle of Saunders.

As the latter is not before the court, his rights as against the bank cannot be investigated or determined. We have only to do with the rights of the assignee and of the bank. And thus the question is narrowed down to this: Had the bank, as against the estate of Downing, the right to prove its claim to the full amount of the draft? Or, in other words, Has the *assignee* the right to insist that the bank must credit the $4,000 and prove for the balance only? This $4,000, it will be borne in mind, was received by the bank, not from the estate of Downing, the principal debtor, but from his surety, and was received by it after the bankruptcy, though in pursuance of an agreement made just before that event, to which, however, Downing was not a party.

The question here presented depends upon the construction of section 19 of the bankrupt act, to the terms of which I will refer in a moment. The bank being a *bona fide* holder of the draft for value, would be entitled on the supervention of bankruptcy to prove against any and all parties against whom it could have supported an action on the bill; and unless it had released or parted with its rights, it could have sued concurrently both the acceptors and the drawer. (Chitty on Bills, 721; *Ib.* 703, 708.) It could recover against both, though of course it could have but one satisfaction. Its agreement of November 8th, before-mentioned, would have prevented it from sustaining any action after that time against the accommodation acceptors; or, if they had gone into bankruptcy, from proving against their estate. But this agreement on its face declared that it did not prejudice the rights of the bank against Downing. Before any payment, so far as this record shows, was received by the bank,

Downing was adjudicated a bankrupt; and his assignee claims that the bank must now credit the amount which it received after the bankruptcy, not from Downing, nor from anything he had pledged to secure the debt, but from his accommodation acceptor.

This question is settled by the bankrupt act: "All debts due and payable from the bankrupt at the time of the adjudication of the bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made, may be proved against the estate of the bankrupt." This $8,000 draft was due and payable to the bank by Downing, the principal, at the time he was adjudicated a bankrupt. At that time the bank had received nothing from any one, and has received nothing to this day from Downing or his estate or property. If Downing had not been put into bankruptcy, and had been sued on the draft at law, a plea that the bank had entered into a covenant not to sue his surety would have presented no defence. This was simply a covenant not to sue the accommodation acceptors, and did not, under the authorities, extinguish or satisfy the debt, or any part of it, as against the drawer, who had, in no event, any recourse over against the acceptors. (Vol. II. Parsons on Notes and Bills, p. 238; Story on Notes, secs. 409, 421, 426; Jones v. Broadhurst, 9 Man. Gr. Scott, 173.) The statute, by the language above quoted, requires debts to be due and payable at *the time of the adjudication of bankruptcy*, or to be *then* existing, though not payable until a future day; and at the time of the adjudication of bankruptcy the whole amount of the draft was due to the bank.

If it had afterwards received payment by or through Downing or his property, it might have been compelled to credit it. (Sec. 22.)

The next portion of section 19 which refers to the question before us, reads as follows: "Any person liable as bail, surety, guarantor, or otherwise, for the bankrupt, who shall

have paid the debt, or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced." The act proceeds: "And any person so liable for the bankrupt, who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same in the name of the creditor or otherwise, as may be provided by the rules," &c.

These provisions apply to the question presented in this case. Now conceding, for the purposes of this appeal, but not deciding, that when the bank received the $4,000 of Saunders, it operated as a payment or satisfaction *pro tanto* of the draft, yet, as the whole debt was not paid, nor part in discharge of the whole, the bank could still, under the language of the act, prove the whole amount as against the drawer, and at the most would be liable only to be treated as proving or having proved, for the benefit in part of the party from whom it received, as the surety of the bankrupt, such partial payment. If the bank should refuse or omit to prove for the whole amount, then the party paying could make the proof, in the name of the creditor, or otherwise.

This view of section 19 will be found to be much strengthened by the course of decision under the English bankrupt acts, both prior to and since the act of 6 Geo. IV. chap. 16, sec. 52, from which this portion of the 19th section of our act is substantially taken. It would too much protract this opinion to go at length into a review of the English legislation and decisions, and I will content myself by referring to Mr. Chitty's view of them in his work on Bills. (Chitty on Bills, 703, 727.)

On the agreed statement of facts, the bank, as against the objection of the assignee, is entitled to make proof for the whole amount of the draft, and if Saunders claims, as to the

$4,000 which he paid after the bankruptcy, that he is entitled to stand in the place of the bank, he can make application to the bankrupt court to that effect. This will bring the two parties interested face to face, and the court will determine their rights upon the case they make. It would be premature to pass upon them now. If Saunders should establish his right to prove against the estate for the $4,000 paid to the bank, or to hold the estate liable therefor, it will follow that the court will make an order that the proof made by the bank shall to that extent stand for his benefit. If he shall fail to establish this right, it will follow that the bank is entitled to receive dividends on the basis that the whole amount of the draft is due to it.

This disposition of the matter seems preferable to the one made by the district court, since, as we have seen, it is clear that the estate is liable in respect to the whole amount of the draft, either alone to the bank or to it and Saunders. The order appealed from holds that the bank is not entitled to prove as respects the $4,000 paid by Saunders, which is equivalent to holding that Saunders is entitled to make proof for this sum, a question which it is better to determine on an application by Saunders adverse to the bank, and where both parties can be fully heard.

The order of the district court will be modified accordingly, and the cause will be remanded, with directions to overrule the objections of the assignee to the proof of claim of the bank, but with leave to Saunders to apply to the court for an order that the proof made by the bank shall stand *pro tanto* for his benefit, of which application the bank shall be entitled to notice.

MODIFIED AND REMANDED.

NOTE.—In support of the foregoing view, see decision of *Hoffman*, J. *In re Ellerhorst*, 5 Bankr. Reg. 144, and cases there cited. *Exparte De Tastet*, 1 Rose, 10; *Reid* v. *Turnwal*, 1 C. and M. 538.

When payment or satisfaction by one party to a bill or note, will enure to the benefit of other parties: See *Jones* v. *Broadhurst*, 9 Com. Bench (9 Man. Gr. and Scott), 173, where the English cases are collected and reviewed in the learned judgment of *Creswell*, J.

The Porter.

1. **A boat moored in the channel of the river near a large city, and at a place where vessels in making a landing would naturally come, was held to be in fault, because, during a heavy fog and snow storm, in which it was impossible to see but a short distance, it failed to give the usual fog signals.**
2. **The duty of vessels navigating the river during a heavy fog and snow storm, as respects speed, signals, &c. considered.**

(*Before* Dillon, *Circuit Judge.*)

Admiralty.—Collision.—Fog Signals.

This is an appeal in admiralty, from a decree of the district court for the eastern district of Missouri, dismissing the libel. The libellants are the owners of the steamboat Southern Belle, and filed in the district court a libel, which charged upon the steamboat Porter the fault of a collision which happened in the Mississippi river opposite the upper portion of the city of St. Louis, on the 19th day of October, 1869. The Grafton Stone and Transportation Company, as claimants, appeared and filed an answer admitting the collision, but denying the faults imputed to the Porter, and asserting that the accident was caused wholly by the fault of the vessel of the libellants. The other facts appear in the opinion of the court.

M. L. Gray, for the libellants (appellants).

Rankin & Hayden, for the respondent (appellee).

DILLON, *Circuit Judge.*—I have carefully gone over the pleadings and the 680 pages of testimony in this cause, and am of opinion that the decree pronounced below is correct. The material facts may be briefly stated: The libellants are the owners of the steamer "Southern Belle" and her barge, the Gertrude; the claimants are the owners of the steamer "Porter" and her barges. The collision occurred about 10 o'clock in the day time on the 19th day of October, 1869, in the Mississippi river, near the upper portion of the city of St. Louis, at a point in the river nearly opposite the block between Bogy and Le Beaume streets. The libellants' vessel, the Southern Belle and her barge Gertrude, at the time of the collision were lying near the middle of the river, and were anchored there in the manner presently to be stated. The Southern Belle is what is termed a sand boat, that is, she was engaged at the time in elevating sand from the bottom of the river by means of machinery adapted to that purpose. The sand is dredged from the bar or bottom of the stream, and is brought up in buckets on an endless chain, something like the mode of elevating flour in mills, and deposited in the barge. The machinery is located on the steamer, and is propelled by steam. On the morning in question the Southern Belle, with her barge beside her, was lying near the middle of the river, but perhaps somewhat nearer to the Missouri than the Illinois shore. The river at this point is about a mile wide. The Southern Belle was headed up stream, and was kept stationary by being pinioned by four pieces of timber (two at the bow and two at the stern) driven down through the hull into the bottom of the river. At the same time the steamer "Kate Hart," which is also a sand boat similar to the Southern Belle, with her barge attached, was also lying in the river, nearly abreast the libellants' vessel, and about one hundred to one hundred and fifty feet further toward the Illinois shore. Both boats were engaged in ele-

vating sand. The barge of each boat was on the east side, that is, on the Illinois side of the respective steamers.

The steamer Porter was used by the claimants as a tow-boat, that is, to tow barges laden with stone obtained at Grafton, in Illinois, some miles above St. Louis. At the time of the collision the Porter had in tow five barges or boats filled with stone, intended for the bridge which was being built across the river at St. Louis. Two of these barges were on either side of the Porter and the other nearly in front, and with these the Porter was desending the river bound for St. Louis. She had left Grafton early in the morning of the day on which the accident happened.

On the same morning, probably about seven o'clock, the Southern Belle and the Kate Hart left their landings at St. Louis, and went out into the river for sand, and had been at the place above described elevating sand about two hours when the collision, which is the subject of inquiry here, occurred. The water where the Southern Belle was anchored was eleven feet deep, and it was no shallower at any place in the vicinity. At this place, in low water, there is what is termed a sand bar, or a deposit of sand in the bottom of the stream, making the water shallower than it is on either side of it. The river at the time of the accident was in a good stage, there being at least eleven feet of water over what is termed this bar, and a much greater depth on either side of it, and above and below it. There was nothing to prevent vessels running in any part of the stream, as there were no obstructions in the river, and the water was sufficiently deep. The Porter drew less than four, and the largest barge did not draw to exceed five feet. At the place where the Southern Belle was stationed when she was injured, the water was deep enough to float any boat navigating the Missouri or Upper Mississippi, and it was near the place where boats descending the Illinois shore and intending to make a landing in the upper part of the city of St.

Louis would naturally, and in fact, often did come. The Southern Belle and the Hart had been engaged in getting sand from the same bar, as it is termed, for some time, quite constantly during the whole month of October, making one and sometimes two trips a day, each trip occupying two or three hours. They did not, however, take the sand from precisely the same place each time, but from the same neighborhood, being guided on each trip by the soundings, they seeking of course the shallowest water. So during the same time, the Porter was making almost daily trips to Grafton for stone, usually going up on the Missouri side of the middle of the stream, and descending on the Illinois side some hundreds of feet east of where the sand boats were accustomed to be stationed, and in a general way, the business in which these boats were engaged was known to the officers on board of the other.

On the day in question it had been snowing lightly and had been a little foggy all the morning, but not so much that those on board of the boats could not see the banks of the river one-third to one-half mile distant, until about the time of the accident. When the Porter on her way down had reached Venice Ferry, or a short distance below, the snow seemed suddenly to have increased in severity, and the air became so thick that the officers on the Porter could not see the banks on either side, or a distance exceeding fifty or one hundred yards. The testimony establishes the fact that thereupon the pilot rang the slow bells, that the speed of the boat was checked, and that she proceeded on her course at a rate of speed but little faster than the current of the river (which is about four or five miles per hour), and only fast enough to give her steerage way or to keep control of her movements. During this time also, the Port r gave the usual fog signals every two minutes or oftener. One of these signals was heard and answered by a ferryboat in the river at the time, but none of these signals

seem to have been heard on either the Belle or the Hart. And it is argued, and I must say, with much force, that the reason why these signals were not heard by those on board of the sand boats was, that the noise made by the working of the chains and machinery used in raising the sand, prevented it. It is an undisputed fact *that no fog signals* whatever were given either by the Belle or the Hart.

While the Porter was proceeding under slow bells and making the fog signals in the manner above described, the pilot signalled the engineer to land, and thereupon the boat commenced to turn quartering across the stream towards the Missouri shore. She had not gone far in this direction before the pilot and others on board of the Porter saw the Southern Belle not more than one hundred yards distant, whereupon the pilot gave the signal to stop and back *strong*, which was done, but this did not avail to prevent a collision with the Belle and her barge, doing them damage claimed to amount to several thousand dollars.

Those on board of the Southern Belle did not perceive the Porter until she was within fifty or one hundred yards of them.

And the question is, whether the Porter is to blame for the accident, and ought to pay the damage sustained by the libellants, or share the damages with them.

And I observe, first, that the fault of the Belle in not giving any signals is, under the circumstances, most palpable. She was lying stationary and helpless in the middle of the river, or near the middle, opposite a large city. She was where boats had a right to be, and in the neighborhood where they were constantly coming and going. She was firmly fastened there, so that she could do nothing to avoid a collision should one be about to occur. The evidence shows that it required nearly a half hour to unfasten the boat thus pinned down, and get her in motion. She was in eleven feet of water, more than twice as much as steamers

ordinarily need. I need not go so far as to say she was in fault for being there; but that she was in fault when surrounded by the noise of her machinery, and when enveloped in fog and snow, for not giving any warning of her presence or location. Who can say that if she had given the usual fog signals, that the injury of which she complains would have happened? Being thus in fault, the burden of proving an actionable or culpable fault in the Porter is clearly devolved upon the libellants.

The libellants insist on the testimony of the Porter's own officers, that the snow and fog were so thick that they could not see the banks, nor see a distance exceeding fifty or one hundred yards in advance; that the Porter ought to have landed, and that she is to blame for proceeding under such circumstances towards the harbor of the city. There would be more ground for the objection, if the testimony did not establish that the character of the banks on each side was such that a landing could not be safely effected, or would be attended with so much peril, as to make it unreasonable to require it as a duty which, under the circumstances, devolved upon the respondent. There is no proof that the upper portion of the landing or levee of the city, where the Porter designed to land, was so crowded with vessels, or the river in that vicinity so filled with them, as to make the course adopted by the Porter one of any considerable peril to herself or others.

The libellants complain, also, that the Porter was in fault because, "although a snow-storm was then prevailing, the Southern Belle could easily have been seen from the Porter, if the latter had kept a good lookout, at least five hundred yards, and in time to have enabled her to avoid collision." The testimony shows that neither boat was actually seen by persons on the other, until they were within about one hundred yards apart, and tends very strongly to show that just at that time it was quite impossible to see them at

any greater distance. There were no lookouts on either the Porter or the Belle such as the law requires.

But the captain, the pilot, and the mate of the Porter were outside, or at their respective posts on duty, and the mate testifies that at and before the collision he was specially engaged in looking ahead and listening to hear the sound of other boats; and it seems quite clear from the evidence that the absence of a special lookout was of no consequence. Certain it is, that in respect to lookouts, the Belle appears to have been more at fault than the Porter, and the officers of the latter saw the Belle a little before her officers saw the Porter. On the whole, it seems reasonably clear that no omission of duty on the part of the Porter with respect to lookouts, either caused or contributed to the injury. The Belle was seen as soon as in the storm and fog she could have been, and she had given no signal, and so none could have been heard, had there been ever so many look-outs on duty listening for them.

The libellants also complain that the Porter is in fault because she knew, or had reason to believe, that these sand-boats would be stationed thereon, or near the bar, and that she could or ought to have avoided them by keeping in the usual track of boats, some hundreds of feet east. The so-called bar (being in or near the middle of the river, and covered by at least eleven feet of water) is, at the then stage of the river, a misnomer. All vessels had a right, using due care to avoid injury to boats moored or anchored there, to pass along that portion of the river, and are not in fault merely for *doing so*. But in the storm then prevailing, the Porter did not know precisely where she herself was, nor could she know that the sand-boats would be in the course she had taken to make a landing at the city.

If the Porter had known that the sand-boats were there, or if she had reason to believe that they were there, and if she had control of her own movements and course, and un-

necessarily put them in peril, the case would be very different from the one presented by this record.

The complaint that the Porter was carrying a heavier tow than she was capable of managing, and the other complaint that she was running at an improper rate of speed, are both negatived by the evidence, which, on those subjects, is substantially all one way.

Nor is there any ground to claim that the mismanagement of the Porter and her tow, after the Belle was discovered, either caused the collision or increased the extent of the damages. She at once reversed her engine and commenced to back, and if she had been handled differently, it is not improbable that she might have swung around and injured or sunk the Kate Hart, which was lying within one hundred or one hundred and fifty feet of the Southern Belle.

Nor can it be claimed on the proofs that the Porter was in fault for not anchoring in the stream until the storm was over and her way was plain. She was going under slow bells, giving signals, and hearing none she had a right to suppose that there was nothing in danger from her movements, and the river is not so crowded with boats as under the circumstances to have made it the duty of the Porter to have subjected herself to the peril of attempting to anchor, even if it were practicable.

The decree below is affirmed.

AFFIRMED.

NOTE.—Bearing upon and supporting the decision in this case, see: *Strout* v. *Foster* (*the Louisville*), 1 How. 89. The S. B. *New York* v. *Rea*, 18 How. 223; *Culbertson* v. *Shaw* (*the Southern Belle*), *Ib.* 584; *The Indians*, 1 Abb. (Adm.) R. 330; 3 Blatchf. 92; *The Bay State*, *Ib.* 235; On appeal, 18 How. 89; *The Scioto*, Davies Rep. 359; *Bazin* v. *Steamship Co.* 3 Wall. Jr. 229; *The Rocket*, 1 Bissell, 354.

NEWTON *v.* MUTUAL BENEFIT LIFE INSURANCE COMPANY.

1. In an action on a life policy, where the issue on trial was whether the assured "died by his own hand," and where it was clear that he had been killed by a pistol shot, the court admitted in evidence as part of the *res gestæ*, the declarations (under the circumstances stated in the case) of another person since deceased as to the manner in which the death had been caused: Following the *Insurance Co.* v. *Mosley*, 8 Wall. 397.

2. *Ex parte* affidavits of third persons furnished to the company by the plaintiff, to show the fact of death, were rejected as evidence when offered by the company on the trial to establish a controverted fact as to the mode of death.

(*Before* DILLON and TREAT, JJ.)

Life Insurance.—Res Gestæ.—Ex parte Affidavits as Evidence.

1. ON the trial this question of evidence arose: It appeared that Newton, whose life was insured for the benefit of the plaintiff, went to Los Angelos, in California, a stranger, but with letters of introduction to prominent citizens, and registered himself at the hotel. The landlord's deposition was taken to prove the death of Newton, and the circumstances. He testified, in substance, that on the same night, about two o'clock, he heard the report of a pistol, called his wife's attention to it, immediately arose, and at once went out into the hall, not stopping to dress himself, and on reaching the door of the room next to his (which room was occupied by a man by the name of Burns) he met Burns coming out, seemingly excited, saying *something about the man having shot himself.* The landlord passed into the room, found Newton sitting upright on the bed, with part of his clothing off, with eyes open, with fresh blood over the region of the heart, a pistol lying beside the bed, and on being approached, it was found that Newton was dead. This was not the room assigned to Newton, but to Burns. It was proved at the trial that Burns was then dead, and that no one was present at the time when the pistol was

fired, unless Burns was then present. The issue on the trial was, whether Newton "died by his own hand," within the meaning of the policy. The plaintiff objected to that portion of the testimony of the landlord in which he states that Burns, as he came out of the room, said *something about the man having shot himself.* The court, upon consideration, ruled that the declaration of Burns ought to be received for the consideration of the jury, and the declaration was part of the *res gestæ* of the event under investigation, within the reasons and principles of the decision of the supreme court in the case of the *Insurance Company* v. *Mosley*, 8 Wall. 397.

2. The policy contained a provision that the sum insured should be paid "within ninety days after due notice and proof of death." The mode of proof was not prescribed. The father of the plaintiff, acting for her, delivered to the agent of the company several *ex parte* affidavits of third persons, taken in California, to show the death, but these affidavits were accompanied with no statement by the plaintiff, or for her. The company, claiming that these affidavits showed that the person whose life was insured committed suicide, refused, on that ground alone, to pay. These facts being shown by the plaintiff, the company offered in evidence on its part these affidavits so delivered to it. The plaintiff objected. After consideration of the cases cited by counsel (particularly, *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213; *Cluff* v. *Life Ins. Co.* 99 Mass. 317; *Irving* v. *Excelsior Ins. Co.* 1 Bosw. (N. Y.) 507), the court ruled that the evidence was not competent.

The court observed that the affidavits, etc., may be received in evidence to show that due proofs of death were made, where there has been no waiver; but they are not competent evidence on the issues joined at the trial as to the controverted facts. Preliminary proofs are for the satisfaction of the company in the first instance, so that it may

determine whether it will pay without a contest, or will remit the claimant to a judicial forum to establish his demand. When that judicial forum is resorted to, the case is to be tried on the issues, under the ordinary rules of evidence.

Geo. P. Strong and *T. Z. Blakeman*, for the plaintiff.

Lackland, Martin & Lackland, for the company.

NOTE.—The plaintiff recovered, and the defendant sued out a writ of error to the supreme court.

BAUBIE *v.* ÆTNA INSURANCE COMPANY.

A local agent of a foreign insurance company, empowered to solicit insurance, receive premiums, and to issue and deliver policies, has, in favor of third persons dealing with him in good faith, and without notice of any restriction on his authority, power to bind the company by parol as well as by written contracts for insurance, and may thus bind it by a parol contract to renew the policy from time to time during the plaintff's ownership of the property.

(*Before* DILLON and TREAT, JJ.)

Insurance.—Power of Local Agents.— Verbal Contract to Renew Insurance.

THIS is an action to recover the sum of $4,000, which the plaintiff alleges the defendant had verbally agreed to insure upon a hotel building, at Cameron, in this state, of which property the plaintiff held the title in trust.

The principal question of fact controverted on the trial was whether there was any such contract subsisting between, and binding upon, the parties at the time the build-

ing was consumed by fire. The company denied that in point of fact any such contract was made by its agent, and denied, also, if its agent undertook to make such a contract, that he had any power or authority to bind the company thereby.

It was admitted, or not controverted, that the local agent of the defendant for that part of Missouri where the property in question was situate, was, in 1869 and the early part of 1870, one McMichael, who resided at Plattsburg, and not at Cameron. It appears he was entrusted with blank policies, signed by the officers of the company, and was empowered to fill up and deliver such policies without first consulting the company. He was the company's agent for taking risks and making insurances within the district above referred to. It is also an admitted fact that on the first day of May, 1869, the company, through McMichael, did issue a policy of insurance, in writing, to the plaintiff, for $4,000, for six months, on the hotel building in question; that when this six months expired the policy was renewed for another term of six months; that there was no written renewal after that; and the property was destroyed by fire on or about June 21, 1870. The jury were instructed by the circuit judge as appears below.

Hitchcock, Lubke, & Player, for the plaintiff.

Mr. Clover and *Mr. Eaton*, for the company.

DILLON, *Circuit Judge*.—I. The plaintiff seeks to recover in this action not upon a written policy, but by virtue of an alleged parol or verbal contract, which he claims was made at the time the first policy was issued, to the effect that while the plaintiff continued to hold the title to the property, as trustee, the company would keep the same constantly insured, by renewing the policy at the expiration of every six months and drawing on plaintiff (who resides at a

different place from the agent of the company) for the premium, unless notified by the plaintiff to the contrary before the expiration of any period of six months.

This contract being denied by the defendant, the burden of proof is on the plaintiff to establish its existence.

And in view of the fact that contracts of insurance are almost universally reduced to writing, and especially in view of the indefinite duration of the engagement which the plaintiff asserts the company made, we feel it our duty to say that not only is the burden upon plaintiff to establish the existence of the contract he sets up, but to make clear, precise, and satisfactory, proof of it. Bear in mind that it is a *contract*—that is, a definite and completed agreement, which the plaintiff alleges and must prove; a contract, binding upon both parties, and subsisting between them at the time of the loss, and which bound the plaintiff to pay the premium had the loss not happened, as well as bound the defendant to pay the amount insured if the loss did happen. Conversations or negotiations about expecting to renew during the period of the plaintiff's ownership, not resulting in a definite agreement, are not binding. It must be a concluded contract subsisting between and binding both parties which must be established. If you find from the evidence that the only agreement which the agent made was to make one renewal, to-wit: in November, 1869, and did not agree to continue to renew, without request, after that, then you should find for the defendant.

II. But if you find from the evidence that the contract set up by the plaintiff has been established as one which was, in fact, entered into between the local agent of the defendant and the plaintiff, then the next question to be considered is, whether the agent of the defendant had authority to bind the company by such a contract.

Now, in law, as settled by the supreme court of the United States, the powers of an insurance agent are pre-

sumed to be co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency is held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal. (*Insurance Co.* v. *Wilkinson*, 13 Wall. 222, 235.)

We instruct you on this subject, that if the agent of the defendant, McMichael, was empowered to transact the business of insurance for it at his local agency, to solicit insurance, to receive premiums, to issue and deliver policies, then he would, in favor of third persons dealing with him in good faith, have authority to bind the company by parol contracts as well as by written contracts for insurance, unless notice of restrictions on his power in this respect is brought home to the persons dealing with him; and under these circumstances, and with these limitations, he would have authority to make (if he in fact did make, of which you are to judge from the evidence), such a contract as the plaintiff alleges, and such contract, if made, would be binding upon the company.

TREAT, J., concurs.

JUDGMENT FOR PLAINTIFF.

NOTE.—There was a verdict for the plaintiff and judgment upon it. A bill of exceptions was signed.

It has been decided by the court of appeals of New York that an agreement to the effect that until notice by the one party to the other, a fire policy of insurance shall be renewed from year to year, is not within the *statute of frauds*, and may be by parol. *Trustees of Baptist Church* v. *Brooklyn Ins. Co.* 19 N. Y. 305; 29 N. Y. 153; reversing S. C. 18 Barb. 69.

Parol contracts for insurance, see *Hening* v. *United States Insurance Co.* *ante*, 26; *Taylor* v. *Germania Ins. Co. post*. *Power of local insurance* agents to act for and bind the company: *Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *Geib* v. *Insurance Co.* 1 Dillon C C. 443, 450.

Elias Swick v. Home Life Insurance Company.

1. When a life policy of insurance *is assigned* by the assured, with the consent of the company, to a creditor of the assignor, to secure a past debt and future advances, the assignee has all the rights which the executor of the assured would have had if the policy had not been assigned, and can recover, if entitled to recover at all, the full amount thereof, irrespective of the amount of his debt against the assured.
2. A life policy taken for the benefit of and assigned to a person who has *no insurable interest* in the risk is void. [See *Holabird* v. *Insurance Company*, note.]
3. Warranty in relation to "*good health*," and being "*free from any symptoms of disease*," construed.
4. Warranty that the assured "had never been addicted to the excessive or intemperate *use of alcoholic stimulants*," and that he "did not *habitually* use intoxicating liquors as a beverage," construed.
5. Distinction pointed out between untruthful answers to specific questions and the mere failure to make *full* answers, and the effect of such failure under the provisions of the policy in suit.
6. By the pleadings, the company set up affirmatively as a defence a breach of specific warranties as to existing facts, and this was denied by the plaintiff: *Held*, that the burden of proof to establish this defence was upon the company. [See *Holabird* v. *Insurance Company*, note.]

(*Before* Dillon, and Treat, JJ.)

Life Policy.—Assignee's Right to Recover.—Wager Policies.—Warranty as to Health, and Use of Intoxicating Liquors.—Effect of Failing to Make Full Answers.—Onus Probandi.

The defendant issued a policy dated February 11, 1870, to William Henry for $2,000, insuring his life. With the consent of the company, the assured, Wm. Henry, by instrument dated March 19, 1870, assigned this policy to the plaintiff. Henry died in June following. The plaintiff sues to recover from the company the amount of the policy. The defendant denies that the plaintiff is entitled to recover, and makes several specific defences to the action, which are noticed in the charge of the court to the jury given below.

John W. Noble, and *Strongs & Hedenberg*, for the plaintiff.

D. T. Potter, and *Lee & Adams*, for the defendant.

Dillon, *Circuit Judge*. — 1. The first defence relates to the assignment of the policy and the plaintiff's rights under such assignment. The plaintiff claims that prior to and at the time of the application for the policy, he was a creditor of Henry, and remained such creditor until his death, and that the policy was assigned to him as security for the debt, and for any sums he might afterwards advance to Henry. If upon the evidence you find this to be the case, then the plaintiff can recover on such policy if Henry's executor could have recovered thereon if the policy had not been assigned. And in such case the plaintiff can recover, if entitled to recover at all, the full amount of the policy, although the debt of Henry to him may be much less than the amount insured. On this subject we may observe that no life policy is valid if taken for the benefit of a person who has no insurable interest in the risk. Hence if this policy on the life of Henry had been taken directly for the benefit of Swick, and Swick at the time was not a creditor of Henry, and there was no agreement or understanding that it was for the purpose of securing him for advances to be made to Henry, and if the plaintiff had in no way an insurable interest in Henry's life, then the policy would have been void. The law forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded.

Hence if Swick and Henry confederated together to procure this policy for the benefit of Swick, who was not or had not agreed to become a creditor of Henry, and with the view of having the same assigned thereafter to Swick, without consideration, or not as a security for a debt due or to become due, or for any other lawful purpose, then such

contrivance would make the policy void. If, on the other hand, Swick was a creditor of Henry, and if the purpose in procuring the policy was to have the same assigned thereafter to Swick for his (Swick's) indemnity, and Swick paid the premium, and the facts were known to the agent of the company, the policy is not void. So if there was, as plaintiff contends, an understanding between Henry and Swick, the latter being a creditor of Henry, or having agreed to become such, that this policy should be taken on Henry's life, with the view of having Henry or Henry's estate in the event of his death in a condition to meet his debt to Swick, and if Swick paid the premium with the knowledge of the company's agent, and thereafter the policy was assigned to Swick when such creditor of Henry, or as a security for debts due or agreed to be created, and the company agreed in writing to such assignment, then the policy and assignment were not invalid. In other words, the law exacts fair dealing in these respects from all parties in interest. It will not uphold a policy made, or fraudulently contrived to be made for the benefit of a person who has no insurable interest in the risk. Mere speculative risks in the lives of others, or gambling policies of any kind, are forbidden for the good of society. It is not necessary for the purposes of this case to discuss what may, under different circumstances, be a mere speculative risk, or what interest will be non-speculative; for in the case before the jury the question is merely on the one hypothesis, whether Swick was a creditor of Henry at the date of the policy, and continued so to be at the date of assignment; and on the other hypothesis presented — that if he had no understanding at the date of the policy concerning its subsequent assignment — whether Swick was Henry's creditor when it was assigned, and remained such until Henry's death.

2. The main defence upon the trial has been rested upon alleged misrepresentations by the assured in the appli-

cation, respecting his health, and his habits as to the use of alcoholic drinks.

In the application the following questions were asked of Henry and answered by him: 6. "Is your health good, and, as far as you know, free from any symptoms of disease?" Answer — "Yes." 9. "Are your habits uniformly and strictly sober and temperate?" Answer — "Yes." 10. (a) "Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium?" Answer — "No." 10. (b) "Do you use habitually intoxicating drinks as a beverage?" Answer — "No."

By the terms of the contract between these parties, these answers are *warranted to be true*, and it is agreed in the policy that if the answers are untrue or deceptive in any respect, the policy shall be void and of no effect. The parties have the right thus to agree, and are bound by their agreement, and hence the importance of understanding what the questions asked were, and the answers given thereto. This is the more important, because if the answers given are untrue, the policy is avoided, although there are no intentional or fraudulent mis-statements, and although the party's habits as to intoxicating drinks did not in fact cause or even accelerate his death. We remark to you first, that the questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning, and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world, and when they ask a man if his health is good, there is no mystery in the question.

If you find from the evidence that at the date of the application Henry's *health was not good*, or if Henry knew of any symptom of disease which he did not disclose, then there can be no recovery on the policy. If you find the fact

to be as the company contends it was, that Henry's general health was at the time impaired by exposure, or from the use of intoxicating liquors, or from any other cause, there can be no recovery on the policy. But if it was known to the company, or its agent taking the risk, that the assured had, as certified by the family physician to the company, been sick a few days before, and if this was a mere temporary illness, which was over at the time, and was disregarded by the company, or its agent taking the risk, as not being within the purview of the question asked of the assured in this respect, the policy would not be thereby avoided.

3. Now as to the questions respecting *intoxicating liquors*. These relate to the habits of the party. The applicant stated that he had never been addicted to the excessive or intemperate use of alcoholic stimulants. This is not a statement that he had never been addicted to the use of intoxicating liquors at all, but a statement that he had never been addicted to the excessive or intemperate use of them, and it is untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants.

The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers you will perceive relate to the *habits* of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant would not make these answers untrue; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to a habitual use of such drinks as a beverage.

It is your province to decide from the evidence whether

the assured was or was not, at the time the application was made, a man whose habits were uniformly and strictly sober and temperate, or whether he did or did not habitually use intoxicating stimulants as a beverage; and if you find his answer to either question to be untrue, there can be no recovery on this policy, although, as above remarked, he did not intentionally make false answers, and although those habits did not in fact cause, hasten, or contribute to the death.

4. We have been asked by the defendant to instruct you that if the answers as to the health and habits are not *full*, correct, and true, the plaintiff cannot recover, even though the failure to make full answers was unintentional.

The application referred to and made part of the policy, contains the provision: "The undersigned does hereby covenant * * * * that the preceding answers and this declaration shall be the basis of the policy; that the same are *warranted* to be full, correct, and true, and that no circumstance is concealed, withheld, or unmentioned, in relation to the past or present state of health, habits of life, or condition of the said party whose life is to be assured, which may render an insurance on his life more than usually hazardous, or which may affect unfavorably his prospects of life," and that if the foregoing answers and statements be not in all respects full, true, and correct, the policy shall be void. The policy repeats or adopts this provision. Now a distinction is to be taken, we think, between untruthful answers to specific questions and the mere failure to make full answers. Such failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life unusually hazardous, or which might affect unfavorably his prospects of life; while an untruthful or incorrect answer to the specific questions asked, renders the policy absolutely void, though made in relation to a matter not material to the risk.

5. The statements and declarations in the application are warranties, and the defence here is that there has been a breach of some of these warranties. Where a party relies on the breach of such a warranty, he must establish it by evidence. This may not be the rule as to *promissory* warranties — that is, where the party warrants that he will not thereafter do or will refrain from doing something stipulated in a policy as to the future.

In this case the alleged breach of warranty is as to the statement of existing facts — the facts as to his health, and the facts as to his habits; and the defendant avers the breach, and therefore it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove that there was no breach.

These observations cover, it seems to us, all that it is necessary to state relating to the law of the case. The *facts* the law commits to your decision, to be decided upon the evidence, and upon the evidence alone, and it expects that your verdict will be one not influenced by any considerations arising from the nature of the parties—that it will be one which is the expression of your unbiased judgment upon the testimony before you.

There was a verdict for the plaintiff.

JUDGMENT ACCORDINGLY.

NOTE.—As to the burden of proof, see *Terry* v. *Insurance Co.* 1 Dillon C. C. 403; affirmed in supreme court, December term, 1872. Compare, however, *Price* v. *Phœnix Life Insurance Co.* 2 Ins. Law Jour. April, 1873.

Holabird v. *Insurance Company:* As further illustrating the question of *insurable interest, breach of warranty, and burden of proof,* we subjoin a brief report of the case of *Carrie Holabird* v. *The Atlantic Mutual Life Insurance Company*, which was tried in the circuit court at the same term (March, 1873) as the preceding case, before Mr. District Judge TREAT and a jury. The action was upon a policy for $10,000 in favor of the plaintiff upon the life of one O. F. Holabird, who was alleged to have been her husband at the time the policy was procured and when the death took place. The special defences were want of insurable interest

and breach of warranty, and the questions made sufficiently to appear in the following charge to the jury, by

TREAT, J.—Under the issues in this case, *the plaintiff must prove that* at the date of the policy sued on *she was the lawful wife of O. F. Holabird*, the person on whose life the risk was taken. If, at the time of the marriage ceremony, in May, 1861, testified to by plaintiff, the said O. F. Holabird had a wife living, then said alleged marriage with plaintiff was void, and the plaintiff could not be, or become, the lawful wife of said O. F. Holabird during the lifetime of his former wife.

By the statutes of Missouri, marriage is declared to be "a civil contract, to which the consent of the parties capable in law of contracting is essential." If subsequent to the death of the former wife, were there one, Mr. Holabird and the plaintiff, being over twenty-one years of age, were married, and that marriage was prior to the date of the policy, and they continued to live together as husband and wife until the policy was issued, then she, as his wife, had an insurable interest in his life.

It is not necessary to the validity of a marriage in Missouri that any special ceremony, religious or otherwise, should be performed, nor that the marriage should be solemnized before any person belonging to any one of the classes named in the Missouri statute as authorized to perform the ceremony. Marriage in Missouri may be had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists. And such is substantially the law in Tennessee and Illinois, so far as the same affects this case. Therefore, should the jury believe, from the evidence, that at the date of the marriage ceremony with the plaintiff, in May, 1861, Mr. Holabird had another wife living; yet should they further believe, from the evidence, that such former wife died in 1863, and if they further believe, from the evidence, that afterwards, in the state of Missouri, Tennessee, or Illinois, the plaintiff and Mr. Holabird agreed by mutual consent, given in good faith, to become husband and wife, and cohabited as such thereafter, then, from the date of said mutual consent, she was his wife.

The attention of the jury is directed to the difference between the mere attempted recognition of a past void marriage and a subsequent expression of mutual and then present consent to be husband and wife. The subsequent marriage may be proved by habit and repute, if the evidence thereof satisfies the jury that the parties had mutually agreed to become husband and wife, in good faith, and had cohabited thereafter as such. If at the date of the marriage ceremony between O. F. Holabird and the plaintiff in May, 1861, said O. F. Holabird did not have another wife living, then the plaintiff became his lawful wife at that time.

The defendant seeks to avoid the policy by showing that those declarations contained in the application which are specified in the answer filed in this case, were, or some one of them was, in some respects untrue, at the time when made. By the terms of the contract, if any one of the said declarations is found to have been in any respect untrue at the time when made, then the plaintiff cannot recover. It is immaterial whether, if untrue, those declarations were not intentionally untrue, or whether the matter inquired into, had it been otherwise answered, would have caused the risk to be considered more hazardous, or whether the disease denied contributed to the death. Contracts like that sued on are based for their validity upon the truthfulness of the declarations made by the applicant in the written application to the company. As the declarations are presumed to be true, the burden of proving them untrue is upon the defendant, who controverts them.

Whether the representations were material to the risk or not is not open for inquiry in this case; for the defendant and plaintiff agreed, as it was competent for them to do, that if any of the declarations were in any respect untrue, the policy should be void.

Hence it is for the jury to determine from the evidence whether the defendant has shown any one of the declarations to have been untrue in any respect, when made, and also whether the plaintiff has shown that at the date of the policy she was the lawful wife of said O. F. Holabird.

The jury should pass upon this case with impartiality, and free from all prejudice for or against either of the parties to the suit. The rights of corporations and of natural persons are to be decided by the same rules of justice, and should be affected by no considerations except such as the law and evidence require, when controversies arise between them for judicial investigation.

If the jury find for the plaintiff, they will assess her damages at $10,000, deducting therefrom the amount of notes for premiums on the policy unpaid at the time of Mr. Holabird's death, together with any balance of the year's premium remaining unpaid, and will add interest on said sum at the rate of six per cent per year from the time proof of death was submitted to the defendant to the present time.

If the jury find for the plaintiff, and are further satisfied from the evidence that the defendant has vexatiously refused to pay the loss in this case, they may in their discretion, under the statute, add to the foregoing sum an amount not exceeding ten per centum of the amount of the loss. The law commits the question of vexatious refusal to the calm and deliberate consideration of the jury, to be determined in the light of all the facts and circumstances of the case. Stats. 1865, 402, sec. 1.

There was a verdict and judgment for the plaintiff.

BABBITT, Assignee of Miller, *v.* BURGESS.

1. An assignee in bankruptcy may *sue on a written contract* entered into between the bankrupt and the defendant, to recover a debt alleged to be due the bankrupt thereunder.
2. Such a cause of action is not *local*.
3. *Payments* made *mala fide* to a debtor after a petition in bankruptcy is filed against him, are void.
4. Whether payments under all circumstances made to such a debtor are void, *quære?*
5. Mere *technical objections* taken for the first time in the appellate court are unavailing. Judiciary act, sec. 32, applied.
6. The act of May 4, 1858 (11 Stats. at Large, 272), prescribing the mode of procedure where there are several *defendants residing in different districts* of the same state, construed and applied.

(*Before* DILLON and TREAT, JJ.)

Bankrupt Act.—Right of Assignee to Sue.—Payment to Debtor after Bankruptcy.—Technical Objections Unavailing in Appellate Court.—Procedure where Several Defendants Reside in Different Districts of the Same State.

THIS is a writ of error to United States district court for the western district of Missouri.

It appears from the record in this case that the plaintiff is assignee of Bowman, also of Miller, and of Miller & Co.; the copartnership being composed of Bowman and Miller. On the 9th of March, 1868, Bowman was adjudged bankrupt, and thereafter Vose was duly appointed assignee of said Bowman. In June following, said Vose, as said assignee, filed a bill in equity praying for an injunction to restrain this defendant and the Atlantic & Pacific Railroad Company from paying to Miller any money due to said Miller on account of work done for said railroad, and to restrain said Miller from receiving the same. An injunction was granted and served June 17, 1868, on the defendant and the company. In July following, proceedings in bankruptcy were commenced against Miller, and Miller & Co.,

and on the 31st of August, 1868, said Burgess, the defendant, paid to Miller a certain sum of money due to said Miller from the defendant—the amount paid being seventy-five per cent of the amount due. In December, 1868, Miller, and Miller & Co., were adjudged bankrupts in the course of the proceedings commenced against them in July preceding.

Subsequently, Vose resigned his assigneeship; Babbitt was duly appointed his successor, and Vose executed in due form the assignment to Babbitt. The latter, on motion to the court, was substituted for Vose, assignee of Miller, as plaintiff in this cause—this cause having been originally commenced by Vose, when he was assignee, to recover of defendant what was alleged to be due from him to Miller, the bankrupt. After that substitution was made, Babbitt, by leave, filed an amended declaration.

The subsequent proceedings appear in the opinion of the court. The defendant sued out the writ of error that brings the cause to this court.

A. H. Bereman, for the plaintiff in error.

N. Meyers, for the defendant in error.

TREAT, *District Judge.*—After the amended declaration was filed, the defendant moved to dismiss the suit on the ground that "the assignee of Miller & Co. cannot maintain a suit as assignee of Miller," which motion was overruled and an exception thereto saved.

That motion was properly overruled, as is manifest, not only from the record, but from the course of proceedings in those bankrupt cases which involve both private and copartnership estates. In these proceedings, then, Bowman was adjudged a bankrupt on his own petition in March, and therefore his interest in the copartnership assets passed to Vose, his assignee. In July a petition was filed against

Miller, and also against the copartnership of Miller & Co., and both Miller, and the copartnership of Miller & Co. were adjudged bankrupt, and Vose became the assignee of Miller, and also of Miller & Co. Thus, Vose was originally, and the present plaintiff, as his successor, is now assignee, not of Bowman alone, but also of Miller & Co. and of Miller. As assignee of Miller, therefore, he could maintain the suit against defendant on the written contract between Miller and defendant. The motion to dismiss was founded on an error of fact as well as a misapprehension of the relative position of the parties.

The next step by defendant was the filing of a plea to the jurisdiction, which plea was heard and overruled. No exception to the action of the court in that matter was taken; and the plea was evidently bad on its face. It set out that the cause of action occurred out of the district, and that the defendant resided out of the district; but the cause of the action was not *local*, nor was it averred that the defendant was not found and served within the district.

Thereupon defendant filed his plea to the merits, setting up payment to Miller of all that was due him, on the 12th of May, 1868, and prior to any proceedings in bankruptcy against either Miller or Miller & Co., or rather the delivery of the following order to Miller and the receipt of the same by Miller in satisfaction of all due the latter:—

CONTRACTOR'S OFFICE, S. W. P. R. R.,
ROLLA, Mo. May 12, 1868.

To the Commissioners appointed under the law passed by the general assembly, March, 1868, for settlement of claims for work done and materials furnished:

Please pay E. Miller $3,607 7-100, being the amount due him on a full and final settlement of his accounts as

sub-contractor on sections 7 and 8 west of the Gasconade river, on the line of the Southwest Pacific railroad.

[Signed] E. BURGESS & Co., Contractors.

I acknowledge the above to be a just and final settlement of my account with E. Burgess & Co., Contractors.

[Signed] E. MILLER.

To the pleas of the defendant, plaintiff filed a replication, to which there was a rejoinder.

When Vose was assignee, he and defendant's counsel entered into a written agreement of the facts, in order to avoid taking unnecessary depositions. That agreement was an express admission that on the 17*th of June*, 1868, Burgess owed to Miller, for work under his sub-contract, the sum of $3,607 7-100, that sum being the true balance *due at that time*. During the trial, a copy of a notice addressed to plaintiff's attorneys and signed by the attorneys for the defendant, was offered, it being to the effect that the defendant withdrew said written admission, and would object to the reading of the same in evidence at the trial. The transcript does not show that the notice was previously served on plaintiff's attorneys, nor what action, if any, was taken by the court with reference to it. So far as can be inferred, the court did not hold the defendant to his written admission, for the order on the commissioners and the receipt of defendant therefor, above recited, were received in evidence: and also the oral testimony of the defendant and of his bookkeeper, the latter of whom says he personally made the settlement of May 12, 1868, with Miller. It is thus evident that the defendant had the full benefit of all he claimed. His own testimony is, that he delivered the order of May 12 to Miller in payment of the demand due, and then on August 31, 1868, bought it of Miller at seventy-five cents on the dollar. As to the weight of testimony, and the general

finding for plaintiff (this case having been tried without a jury, and no question of law having been saved with respect thereto), the case of *Norris* v. *Jackson*, 9 Wallace, 125, is decisive. This court cannot on a writ of error go behind that general finding to inquire into the weight or sufficiency of the evidence. It is apparent, however, from the transcript, that the order and receipt (so called) of May 12th, 1868, did not amount to an accord and satisfaction. It was an accord, but not satisfaction. It is also evident that neither party regarded it as full satisfaction or payment, for the order remained dishonored as late as August 31, 1868, when defendant says he bought it at seventy-five cents on the dollar. It is probable, therefore, that the district court rightly concluded that the defendant, after he had full knowledge of the pending proceedings in bankruptcy against Miller, and while the injunction was in full force, did make payment to the latter, in fraud of the bankrupt act; and consequently the payment was void. It is not necessary for this court to take the extreme position held by the supreme court of Pennsylvania (4 Bankr. Reg. 147), and rule that all payments made to a debtor, after a petition filed against him in bankruptcy, are to be adjudged void, if the debtor is subsequently declared bankrupt. This court, however, holds that payments thus made *mala fide*, or with a view of defeating the bankrupt act in any of its essential requirements, are void, and the person by whom such payment was made can be held to answer for the original demand to the assignee, whose title relates to the day of commencing proceedings in bankruptcy. It may have been, therefore, that the district court reached the conclusion, from the evidence, that the payment by the defendant in August was *mala fide* and in fraud of the law. And it may be that it was with reference to the *mala fides* that it permitted the injunction record to be received in evidence, which fact forms the principal ground insisted upon for a reversal.

The injunction order, and its service on defendant, tended to show that he had notice, not only of the demand of Bowman's assignee, but of the nature of that demand upon the money due, and also of the then contemplated proceedings in bankruptcy against Miller. If that was the view of the court, the admission of that record was competent, and this court has no means, from the transcript here, to discover anything to the contrary.

As to the objections taken here for the first time, on mere technical grounds, to the pleadings, it must suffice, even if they constituted good causes for a special demurrer (which this court does not admit), that inasmuch as no special demurrer was filed in the district court, the thirty-second section of the judiciary act forbids us to notice them.

That section is very broad and very liberal, and has been held to authorize such amendments to be made, even in the appellate court. Its design is to promote the early, just, and legal determination of matters in controversy. Parties litigant should, if they so desire, interpose their technical objections in the court below, and if they do not, they ought not to be heard for the first time in the appellate court upon such points, especially where it is obvious that the judgment was such as the law and facts demanded. It subserves no good or lawful end to have a right judgment reversed and litigation prolonged, when the appellant has no substantial or meritorious objection to urge—when the technical points presented, it is clearly evident, could not, however decided in the court below, have prejudiced his rights in any way. Loose pleading and practice are to be discouraged; but where the right to amend is liberal, technical and formal defects should be urged, in order that they may be corrected in the court of original jurisdiction. Such defects are no ground for reversal of a judgment here.

The objections interposed to the admission of the injunc-

tion record, and the argument of appellant's counsel, overlooked entirely the enactment of Congress, of May 4, 1858 (11 Stats. at Large, 272). This act prescribes, *inter alia*, the mode of procedure where several defendants reside in different districts in the same state.

The service of the injunction order on defendant in the eastern district was correct, and in strict conformity with this act of Congress. All, therefore, which is in the transcript by way of objection to jurisdiction in the injunction suit, on account of the residence of the defendant and of the place of service, were not well taken. There were three defendants to the injunction suit, and it was stated in the bill that Miller resided in the western district and defendant in the eastern district, and the return to the order shows that they were served in their respective districts, as the act of Congress required.

When this case was here before, the record did not disclose the condition of the injunction suit, and we held the proceedings in that suit to be *inter alios actu*. The present transcript shows that suit to have been substantially between the same parties, and to have been conducted as the act of Congress required; therefore there was no error in admitting that record in evidence.

AFFIRMED.

ATLANTIC & PACIFIC RAILROAD COMPANY *v.* HENRY CLEINO.

1. Under the legislation of Missouri back taxes upon real estate cannot be collected from the personal property of a subsequent purchaser of such real estate; and if such personal property be seized by the tax collector the owner may maintain replevin against him to recover its possession. [See cases in note, *infra*.]
2. *Replevin* lies against the tax collector when the assessment of the taxes is *void* for which the property was seized. Per TREAT, J.

3. The plaintiff is entitled to the benefit of the legislative exemption from taxation contained in the act of the legislature of December 25, 1852. Per TREAT, J. [Other tax cases, see note.]

(*Before* DILLON and TREAT, JJ.)

Illegal Taxes.—Replevin.—Legislative Contract to Exempt Property from Taxation.

THIS was an action of replevin to recover certain personal property of the plaintiff seized by the defendant as sheriff of Phelps county, for taxes assessed in 1868, against the South Pacific Railroad Company, upon lands which were then the property of that company, but are now the property of the plaintiff, another and distinct corporation. The plaintiff claims that the seizure was illegal: First, because the lands taxed were, by a valid legislative contract, exempt from taxation. Second, because the plaintiff was not liable, as the vendee, in 1870, for taxes levied on said lands in 1868.

In support of the first ground, reliance is placed upon sec. 12 of the act of December 25, 1852, relating to the Pacific Railroad Company, of whose privilege in this respect the plaintiff claims to be entitled, as the successor of that company, under various legislative acts and the provisions of the constitutional ordinances of 1865, upon the subject of railroads.

The act of December 25, 1852, sec. 12, provided that "The said Pacific Railroad, and the said Southwestern Branch Railroad shall be *exempt from taxation*, respectively, until the same shall be completed, opened, and in operation, and shall declare a dividend, when the roadbed, buildings, machinery, engines, cars, and other property of said completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the state on other real and personal property of like value. * * *Provided*, That if said company shall fail for the period of

two years after said roads, respectively, shall be completed and put in operation, to declare a dividend, that then said company shall no longer be exempt from the payment of said tax." It is further provided in said section, that after said road is completed and declares a dividend, the president shall return the value of the road-bed, buildings, machinery, engines, cars, and other property appertaining to said completed road, to the auditor of state, who shall assess the tax, and if not paid as therein provided, an action is to be brought to recover the tax, and a penalty imposed for the failure.

The road was not completed until May, 1870, and no dividends have ever been paid. As to the legislative history, see act of December 10, 1855 (laws 1855, secs. 20, 21, 25); constitution of 1865, art. 11, sec. 16, and accompanying railroad ordinances; act of February 19, 1866 (laws 1866, p. 108); act of March 20, 1866 (*Ib.* p. 101); act of March 17, 1868 (laws 1868, p. 118).

On the 20th of October, 1870, the South Pacific Railroad Company, under legislative authority (laws 1870, p. 90), sold and conveyed all its property and franchises to the plaintiff, a corporation chartered by Congress, July 27, 1866.

By virtue of said several acts, and the proceedings and conveyances under them, the plaintiff became the owner of the lands and railroads taxed, and claims to succeed to the original exemption contained in the abovementioned 12th section of the act of December 25, 1852.

The taxes in question were assessed against the lands granted to aid in building the road by the act of Congress of June 10, 1852. The other necessary facts appear in the opinion.

Baker & Jewett, for the plaintiff.

Mr. Clover, for the defendant.

TREAT, *District Judge.*—It is the purpose of the court to state briefly, the conclusions reached in these cases, without giving an elaborate analysis of the various statutes and conveyances mentioned, and without giving *in extenso* the reasons upon which the conclusions are based. The exemption from taxation contained in section 12 of the act of December 25, 1852, must be held to include all the property of the Pacific Railroad Company, whether pertaining to the main or branch road. By the terms of that act the exemption was to continue for two years after the roads were completed, etc.

The main question argued is, whether, under the sales made pursuant to the ordinance of 1865, through which sales the plaintiff claims successorship to the Southwest Pacific Company and the South Pacific, the lands, etc., thus derived continued subject to the original exemption, or whether by force of the constitution of 1865 the exemption ceased, and did not pass to the grantees at said sales and their corporate successors.

It is evident that the terms of the several acts and conveyances are broad enough to continue the exemption in full force. The railroad ordinance required that on the default of the company to pay the principal or interest of the state bonds issued to it, the general assembly should provide by law for the sale of the railroad and other property, and the franchise of the company, "under the lien reserved to the state." In the suit in this court, wherein the Iron Mountain Railroad Company was a party, there was no lien on the franchise of the company reserved to the state. Section 5 of that ordinance provides what shall be done when the state becomes the purchaser of the "railroad and other property or the franchises sold," viz: that "no railroad or other property or franchises purchased by the state shall be restored to the company except upon the terms stated; and also that no sale or other disposition of any

such railroad or other property or their franchises shall be made without reserving a lien upon all the property and franchises thus sold or disposed of," etc.

It seems that the ordinance was designed to, and did, empower the state to sell or purchase and reconvey all the franchises on which a lien had been reserved by the state, antecedent to the ordinance, including exemption from taxation as originally granted by the act of 1852. The provisions of the constitution of 1865 forbade the making of such exemptions *thereafter*; and when taken in connection with the ordinance of even date and of like obligatory force it must be held to except this railroad's franchises as previously granted. The general rule applies that when a special provision is made for an excepted class of cases, the general rule is to be read as if the exception were incorporated in it. In the case of the state to the use of the *Pacific Railroad* v. *Dulle, et al.* 48 Mo. 282, the supreme court of Missouri seems to hold that said twelfth section of the act of 1852 "makes provision for the ascertainment and payment of *state* taxes, but does not include *county* taxes;" but a careful examination of that case and of those to which it refers renders it very doubtful whether that court did intend to be so understood. That was an action of trespass against the collector for buying plaintiff's property for unpaid *county* taxes, and after referring to the general law concerning county assessments, that court says: "We think the statute sufficiently conferred jurisdiction; whether rightfully or wrongfully, it is not necessary now to decide, as nothing but the liability of the defendant is involved in this contest."

The statement to which reference is made is in the revenue law (2 Wagner Stat. 1196, sec. 7, 6), in which "express power is given to the several county courts to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and

licenses made taxable by law for *state* purposes, with certain exceptions."

That court, in the same opinion, says: "From the view we have taken it *will be unnecessary to decide* whether the legislature, acting under the provisions of the constitution, intended by the general revenue law to repeal the alleged exemption from taxes." Hence, it would seem that the court waived the question which, in a former part of the opinion, appears to have been so definitely decided. It closes the opinion with the following views: "When the statute made all property liable to taxation, and empowered the several county courts to levy such sums as might be annually necessary to defray the expenses of their respective counties, by a tax upon all property made taxable by law for state purposes, it conferred the jurisdiction, and was a sufficient warrant for the collector to justify him in obeying the process and mandate placed in his hands." Acting in good faith, and what was deemed good authority on its face, he ought not to be compelled to litigate the legality of the law. This case differs widely from those where the officer has been held answerable in trespass for acting *without any authority.*

Giving to this decision of the Missouri supreme court its fullest scope, it does not cover the cases before us. True, it may be difficult to determine on what established rules it held the defendants in that case not liable if the property levied upon was exempt; for a manifest distinction exists between process resting upon erroneous proceedings and process without any authority—between a void and a voidable proceeding or between errors subject to review or correction in the proper forum, and the entire absence of jurisdiction over the subject matter. If the county had no authority to levy or assess for taxes except on property subject to state taxation, then if the property on which the assessment was made was not subject to state taxation, the

assessment upon it was void. The decision referred to cannot be considered as going further than that trespass will not lie against a collector and his sureties when the assessment and levy are made under a general law, which, by its terms, seems to cover the case, though it be that on a careful analysis of various supposed exemptions, it should be found that an exemption did really exist. If not exempt, then replevin will not lie to take from the collector property by him seized as by distraint, though the mode of assessing the same was informal and irregular. In such a case, inasmuch as ample and proper modes for correcting errors in the assessment exist, and the process is not void for want of jurisdiction, neither replevin nor trespass will lie.

The facts in this case disclose that the assessment was made in 1868, for taxes due upon lands then owned by the South Pacific Railroad Company, and that subsequently a levy therefor was made on personal property belonging to the Atlantic and Pacific Railroad Company. Neither the act of 1870, nor any other act, authorizes a levy for back taxes on real estate, to be made on the personal property of any one, save the person who was the owner of the land at the time the assessment was made. The tax lien may still remain on the land, although its ownership has been transferred, but the personal property of the subsequent owner is not subject to seizure for back taxes due from the prior owner. This point is conclusive of these cases.

Although I am prepared to hold that the property of the Atlantic and Pacific Railroad Company, acquired under the sales made pursuant to the ordinance of 1865, was exempt from state and county taxation for the period named, and consequently the levy of the defendant was void, yet, as Judge DILLON has not looked into or examined that question, the decision of this court is not based on that proposition. It may be that an unauthenticated report of a recent decision by the supreme court of the United States (*K. P. R. R. Co* .v.

Prescott) is decisive of these cases on grounds not presented in argument, inasmuch as all of the lands on which this assessment was made were subject at the time of the assessment to revert to the United States government.

Therefore the court finds for the plaintiff, on the ground that the personal property of the latter was not subject to levy for an assessment previously made on the lands owned at the time of the assessment by another party. In other words, the collector cannot levy back taxes on lands upon the personal property of a subsequent purchaser.

DILLON, *Circuit Judge.*—I concur in the opinion that the plaintiff is entitled to recover, and I place my judgment upon the distinct and sole ground that I discover no authority in the legislation of Missouri, general or special, to levy upon the personal property of A, for taxes assessed against the real estate of B, although since the assessment such real estate may have become A's property; and in such a case, the owner whose personal property is thus seized may maintain replevin against the officer, the same as if his property had been levied upon by the sheriff on an execution against another person.

As this point is decisive of the case, I have not deemed it necessary to examine the question whether the lands against which the taxes were assessed were exempt in the plaintiff's hands under the 12th section of the act of December 25, 1852, and the subsequent legislation of the state, including the constitutional provision (art. 11. sec. 16), and the railroad ordinances referred to in the statement of the case. Upon this subject I give no opinion.

JUDGMENT FOR THE PLAINTIFF.

NOTE.—The *Iron Mountain Railroad Tax Case* referred to in the foregoing opinion of TREAT, J., was the case of *Trask* v. *Maguire, collector*, decided at the October term of this court, 1871. The bill was for an injunction to restrain the state collector from selling certain engines, etc.,

seized to satisfy the tax. The court refused to interfere, and an appeal, which is yet pending, was taken to the supreme court of the United States. No opinion was written, but the following memorandum of the conclusions of the court (DILLON, TREAT, and KREKEL, JJ., concurring) was made at the time.

Mr. Rombauer, for the collector.

Dryden & Dryden, for the Iron Mountain Railroad Company.

DILLON, *Circuit Judge.*—Conceding, but not deciding, that under the act of March 3, 1851, incorporating the St. Louis & Iron Mountain Railroad Company, as amended, February 17, 1853, whereby the "stock" (defined by the statue to include the property of the road) "of the said company was declared to be exempt from all state and county taxes" constituted in favor of the said company an irrepealable legislative contract, exempting its property from taxation by the state, or under its authority, we are of opinion that this exemption or immunity from taxation is not possessed by the present corporation known by the same name.

The state aided the original corporation by the issue of its bonds, reserving a statutory lien or mortgage upon "the road of the company and every part and section thereof, and its appurtenances." [See *Murdock* v. *Woodson, post.*] This lien or mortgage did not embrace the franchise of the road to be a corporation, and the mortgage was not foreclosed until after the present constitution of Missouri went into operation. The lien of the state was foreclosed under the act of February 19, 1866, and the state itself became the purchaser in September, 1866, and subsequently (November 8, 1866) sold the road to McKay and others, who afterwards (January, 1867) sold the same to Allen. Pursuant to the act of March 20, 1866, authorizing purchasers of railroads from the state to incorporate, Allen and others incorporated themselves and adopted the name of the old company. Allen assigned all his right to the new corporation, and the title of Allen and the new company was confirmed by the act of March 17, 1868. (*State* v. *McKay*, 43 Mo. 599.)

Although the state, by legislative act passed after the adoption of the present constitution, undertook to declare that whoever purchased said roads from the state should have all the rights, franchises, and immunities, which were had and enjoyed by the companies for whose default the road was sold (act of February 19, 1866, sec. 9, known as the "sell-out act"); yet we are of opinion that the state could acquire by its purchase at the foreclosure sale no greater rights and interests than such as were mortgaged to it by the companies, and this did not embrace the corporate franchises of the roads except so far as

were necessary and reasonable in order that the purchaser might enjoy the benefits and advantages of his purchase; the right to hold the property exempt from taxation by the state was not acquired by its purchase at the sale, and thus such right did not pass to the state to be held by it without merger or extinguishment. And under the new constitution of the state, which went into effect July 4, 1865, the state was expressly prohibited from thereafter exempting private property from taxation. Art. 11, sec. 16.

Although the tax upon a portion of the property of the company is admitted to be illegal, yet as it is sought to be enforced only by a sale of *personal* property there is no ground for equitable interference, at the instance of the company, by injunction. *Dows* v. *Chicago*, 11 Wall. 108. *Bank* v. *Supervisors*, 25 N. Y. 312. *State* v. *Dulle*, Sup. Ct. of Mo. 48 Mo. 282, 1871. Dillon Munic. Corp. sec. 738, and cases cited; *Union Pacific Railroad Company* v. *Lincoln County*, *post*.

In connection with the case of *Cleino* v. *The Atlantic & Pacific Railroad Company*, we subjoin a report of the case of *Dixwell & Bigelow* v. *Jones*. The plaintiffs were the mortgagees of property for the benefit of bondholders. The mortgage was executed by the South Pacific Railroad Company, and the property mortgaged is now owned by the Atlantic & Pacific Railroad Company. Jones, the defendant, as sheriff of Franklin county, seized the property for taxes due from the South Pacific Railroad Company, the mortgagor. The mortgagees, Dixwell & Bigelow, brought replevin, and the case was submitted to the court upon an agreed statement of facts. The court gave judgment against the plaintiffs on the ground that they had no right to the present possession of the property. The opinion of the court was delivered by

TREAT, J.—This is a suit brought by plaintiffs in the form prescribed by the Missouri statutes, to recover possession of personal property, the form of action being a substitute for the old action of replevin.

The plaintiffs are mortgagees of property now owned by the Atlantic & Pacific railroad, the mortgage in express terms giving to the mortgagor the right of possession until default in payment of the principal or interest of the mortgage debt.

The doctrine in replevin is a familiar one, that plaintiff must not only have a general or special property in the goods and chattels, but also the right of immediate possession. The substituted mode of proceeding under the Missouri statute does not change the rule, for in *Gray* v. *Parker* (38 Mo. 160) it is held that where plaintiff's title is denied, he must show a general or special property in the goods, *and the right of an immediate and exclusive possession.*

It appears in this case that the plaintiffs have no such right of possession. They aver (as the statute requires) that they are the owners of the property, and make affidavit that it has not been seized under any process, execution, or attachment against the property of the plaintiffs. The property was seized, however, under process duly issued for the collection of county taxes, assessed against the Atlantic & Pacific railroad, which corporation is the lawful successor of the mortgagor; and, hence, the question presented is, whether a mortgagee who has no present right of possession can maintain replevin against a tax collector who has seized the mortgagor's property as by distraint, to enforce the payment of taxes due. In the first place, the mortgagees in this case are not owners entitled to immediate or exclusive possession; and, secondly, it matters not that the process was not formally issued against their property, but was issued against the property of the mortgagor. There is no need of argument to show that a tax properly assessed against the property of a mortgagor in possession, who is also entitled to the immediate and exclusive possession, is valid and binding on said property, despite any claim a mortgagee may have in the property. In a narrow and restricted sense, or nominally, the process did not issue against the property of the plaintiffs, but really and actually the process was issued against their property, so far as they had any interest in it. (*Freeman* v. *Howe*, 24 How. 451.)

It is contended that the assessment was irregular, and therefore this court should pronounce the seizure wrongful or void. The supreme court has in many cases held directly the reverse. (*State, &c.* v. *Dulle*, 48 Mo. 283; *Mayor, &c.* v. *Opel*, 49 Mo. 190; *Walden* v. *Dudley*, 49 Mo. 419.) In 48 Mo. 283, that court held that whether the stock of shareholders was to be taxed, or the property of the corporation, was a question to be determined in the first instance by the assessing board, and that when the tax was assessed, whether in the one manner or the other, and the collector proceeded to distrain accordingly, he was not a trespasser, notwithstanding the mode of assessment was not regular. Indeed, it is obvious, as has been repeatedly decided in this class of cases, that when modes of assessment are prescribed, to be enforced by designated tribunals, whose decisions are subject to review in direct proceedings, and the proper tribunal has made an assessment which the collector enforces, no action will lie against the collector. Were this otherwise, there would be no safety for the collector, and no certainty or promptitude in the collection of the public revenues. This is illustrated in the cases just cited from the Missouri Reports, and also in *Erskine* v. *Hohnbach*, decided by the United States supreme court, 1871, 14 Wall. 613. See also *Deahler* v. *Dodge*, 16 How. 632; Dillon Munic. Corp. sec. 176, note.

If, however, there is no authority to assess at all (as where the property is not taxable, or is exempt), it may be that the proceedings of the board of assessment being void, the collector would not in such case be protected. Under this rule it is urged that the process under which defendant acted was void, and consequently his seizure invalid. Counsel urged further, that by the act of March 10, 1871, the county board of equalization ceased to have any power to act in the premises. That act could hardly relate to any assessment for taxes in 1871, inasmuch as the returns, etc., prescribed by it are to be made thereafter on the first of February of each year, and to a different board, for the first time created by that statute.

The principal purpose plaintiff's counsel had in view, as stated by him to the court, was to procure a decision on the main question concerning the exemption of the Atlantic & Pacific railroad company, as the successor of the South Pacific company, from state and other taxation, notwithstanding the forfeitures and sales mentioned and the provisions of the state constitution of 1865. It is obvious, from the views already expressed, that no opinion on that point is necessary to the determination of this case, and, consequently, a labored analysis of the various statutes and acts done thereunder, and the effect of the new constitution with reference thereto, would be entirely superfluous. It does not become United States courts to travel beyond the requirements of suits pending in them, for the purpose of construing state constitutions with reference to state legislation and the acts of state authorities, more especially when the questions affect the revenues of a state and its mode of raising and collecting the same. The harmony of our complex system of government can be better maintained by leaving the decision of all such questions, so far as practicable, with the proper judicial tribunals of the state. (*Union Pacific Railroad Co.* v. *Lincoln County*, *post*.)

It may be stated as a general rule, supported by numerous authorities in England and this country, that replevin is not the proper mode of testing the *regularity* of tax assessments; and that when property has been seized, whether under a warrant of distress or other warrant, issued to enforce the payment of taxes, it is in *custodia legis*, and is irrepleviable. The reason generally stated is that the collection of the revenues of the country cannot be thus interrupted at the instance of any and every tax-payer, leaving, it may be, the government treasury exhausted pending the consequent litigation. Whether that rule prevails in full force in this state, as the language of the statute seems to imply, need not be decided in this case, because the plaintiffs have no right of immediate possession, and no right of exclusive possession of the property seized — indeed no present right of possession whatever; and, consequently, cannot maintain this action, whether the assessment was irregular, or void *ab initio*, or otherwise.

The next question is as to the judgment in this case. The plaintiffs have taken out of the possession of defendant property valued at $20,000, and have no right to the possession thereof. It may be that the mortgagor has such right as against this defendant, but the latter is responsible to the real party in interest, viz: the mortgagor. If the defendant has seized, rightfully, the property in question, for taxes, amounting to some $8,000, and the same should be sold by him for its value, viz: $20,000, the surplus over the amount for which distraint was made, he would be liable to pay over to the mortgagor. The mortgagee, however, is not entitled to the possession of the property, nor to the surplus after the distraint is satisfied. This is not a case between general and special owner, and is, therefore, not within the decisions referred to. But inasmuch as this seems to have been a case in which the mortgagees appeared for the benefit of the mortgagor, the court will, on the suggestion of the attorney for both mortgagor and mortgagee, render judgment for the return of the property replevied on payment of the amount of taxes, with interest, for which the defendant made his seizure.

What the remedies of the mortgagor may have been, or may be, is not a subject of inquiry in this case, or between the parties to this record.

DILLON, *Circuit Judge*, concurs.

JUDGMENT FOR THE DEFENDANT.

D. T. Jewett and *James Baker*, for the plaintiffs.

Thos. W. B. Crews and *James S. Laurie*, for the defendant.

In *The First Division of the St. Paul, &c. Railroad Co.* v. *Parcher*, 14 Minn. 297, 1869, an immunity from taxation in the original charter of a railroad company was held to accompany lands transferred by the state (after a foreclosure of a lien in its favor), to a new corporation. See, also, *County Commissioners* v. *Franklin Railroad Co.* 34 Md. 159; *Tomlinson* v. *Branch*, 15 Wall. 460; *Wilmington, &c. Railroad Co.* v. *Reid*, U. S. Sup. Court, December Term, 1872.

URIEL A. MURDOCK and LUTHER CLARK v. SILAS WOODSON, Governor of Missouri, H. CLAY EWING, Attorney General, and THE PACIFIC RAILROAD.

1. *The trustees in a railway mortgage* for the benefit of numerous and widely scattered bondholders secured thereby, *have sufficient authority and interest to enable them to bring a bill* in equity to enjoin an alleged illegal proceeding which will injure the value of the bonds and cast a cloud upon the security, or a bill to have a controverted priority of lien settled before an irredeemable sale is made under another mortgage, which is claimed to be prior to that made to the trustees.
2. *The Circuit Court* of the United States *may, in a proper case, enjoin the agents or officers of a state*, whatever may be their grade, and this although the state may be the real party in interest; this doctrine applied in this case against the governor of Missouri acting as the special agent of the state in the foreclosure of a mortgage lien for the benefit of the state.
3. In 1868, the state of Missouri, holding a first mortgage lien upon the Pacific railroad of that state as indemnity for state bonds issued for the benefit of that company, passed an act by which, in consideration of $5,000,000, to be paid by the company to the state, and which was paid, the state released and discharged the company from the lien and all liability in respect of said bonds; and on the faith thereof the company mortgaged its roads to raise money to pay the state, undertaking to give the lenders a first lien. In 1873, the legislature of the state directed the foreclosure of the state's mortgage which had been released: *Held* (construing various provisions of the constitution of the state),

1. That, under sec. 27, art. IV. of the constitution of the state, the act of 1868 was not invalid because it was a *special law*.

2. That under sec. 32 of art. IV. of the state constitution, it was not invalid because it related to more than one subject; and it was also held that the subject was sufficiently indicated by the *title* of the act.

3. That the *state legislature was not prohibited* by sec. 15 of art. XI. of the state constitution, or by the railroad constitutional ordinance of the state *from discharging its mortgage or lien* on receiving the full value of its security, and of that value the legislature was the judge; so held in favor of bondholders who in good faith advanced to the company the money with which to make payment to the state.

4. *It seems* that the statutory lien reserved by the state was for its indemnity, and was under its control as between it and the holders of its bonds.

(*Before* DILLON, *Circuit Judge, at Chambers, June* 16, 1873.)

Railway Mortgage.—Power of Trustees to Sue.—Jurisdiction of Federal Court over State Officers.—Constitutional Law.—Special Acts.—Title of Act.—Construction of the Constitution of Missouri as to Release of the State's Lien on Railroads.

THE case came before the circuit judge at his chambers on an application by the plaintiffs, trustees in a mortgage made by the Pacific railroad of Missouri, dated July 15, 1868, for a preliminary injunction to restrain the defendants—Woodson, who is the governor, and Ewing, who is the attorney general, of the state of Missouri—from advertising and selling the said Pacific railroad and its franchises under a statutory lien thereon claimed by the state of Missouri. The bill is very voluminous, but the following abstract will suffice to show its general nature and scope.

It sets forth that the plaintiffs are citizens of New York, and that Woodson and Ewing, named above, are governor and attorney general of the state of Missouri, and that the Pacific railroad is a corporation created by and under an act to incorporate the Pacific railroad, approved March 12, 1849, to construct and operate a railroad from St. Louis to a point near Kansas City, and that it did in 1851 commence the construction of the said road, and that now said road is two hundred and eighty-three miles in length; that during the progress of the work of construction the state loaned its credit to the company by issuing its bonds to the aggregate amount of $7,000,000; that of the bonds so delivered to the company the sum of $2,000,000 was under the act of February, 1851, entitled "An act to expedite the construction of the Pacific railroad, and of the Hannibal & St. Jo. railroad." The bill then recites the terms and conditions upon which the bonds were to be paid, and also the conditions upon which bonds were granted to the railroad in 1855, and

also that by authority of acts of the legislature subsequent to the act of 1851, bonds to the amount of $5,000,000 were issued by the governor and delivered to the railroad company, and negotiated, the proceeds being used in the construction of the road — said bonds constituting a mortgage or first lien on the road and its appurtenances.

It is stated that the entire amount of bonds thus issued was $7,000,000, the first $3,000,000 being redeemable at the pleasure of the legislature at any time after the expiration of twenty years from date of issue, and the remainder payable in thirty years from date of issue.

The bill then sets forth the disastrous effect of the war of the rebellion on the road, then completed from St. Louis to Sedalia, one hundred and eighty miles; that no work of construction was done between the years 1861 and 1864; nor was work resumed until after the legislature had empowered the company to borrow money to complete its line authorizing it to issue 1,500 bonds of $1,000 each, bearing interest at the rate of seven per cent, payable in four, five, and six years after date, to secure the payment of which the company was authorized to place a mortgage constituting a first lien on the line of its road *west of Dresden for a distance of sixty-five miles*, it being required that the proceeds of said bonds should be applied to the completion of that part of the road. By the same act, the state of Missouri relinquished its first lien and mortgage, and right of forfeiture on all that part of the road west of Dresden, retaining, however, a second lien or mortgage thereon, with condition that on the payment of the $1,500,000 the state's second lien should become a first lien. By the provisions of the act it was made obligatory on the company to apply all its net profits to the extension and equipment of such part of its road until fully completed, reserving sufficient only for the payment of interest on the bonds actually issued by the company known as the Dresden bonds. The company obtained

the money on these bonds, and was extending the line in 1864, when "a large army of insurgents" entered the state and marched along the line from Franklin, thirty-five miles from St. Louis, to the western terminus of the line at Warrensburg, a distance of one hundred and eighty-three miles, and destroyed bridges, cars, engines, and other property to an amount exceeding $1,000,000, rendering the road unfit for use for many months thereafter, and hence the road was not completed to the state line within the time, or at such reasonable cost as was contemplated by the Dresden bonds. In consequence of these serious losses, and the inability of the state to extend any more aid, the people of the city and county of St. Louis, by authority of law, loaned their credit, in 1865, to said company in the sum of $700,000, for which bonds of the county for that amount were issued, payable in twenty years from date, and delivered to the company on its obligation to pay the interest as it matured, and redeem the bonds themselves when due.

The road was finally put in running order to the western boundary of the state, in 1866, but the Dresden bonds and the county credit proved insufficient to pay for such extension and for the repairs and equipment, and at the time of the completion there remained due, chiefly to citizens of Missouri, a large floating debt, "which in equity and good conscience, together with the loan by St. Louis county, possessed claims for payment not inferior to those possessed by the state under its statutory mortgage. In 1868, the said floating debt amounted to $1,092,848, besides an unaudited debt of $290,000, and the first installment of the Dresden bonds, $500,000, was not paid. At this time a large portion of the stock, $3,614,500, was held by citizens of Missouri, and by counties and cities therein—$2,280,000 being held by St. Louis city and county. So the company appealed to the general assembly and people of the state for protection—since if the governor sold the road, according

to the terms of the bond acts, all of the stock would be foreclosed, and the purchaser would hold the road and appurtenances uncontrolled by the said stock, or any part of it, and a loss of over $3,500,000 would be inflicted on the state —and great losses on other people. The state came to the rescue, and proceeded to legislate on the subject of a settlement and payment by the company of all claims due the state, the foreclosure of its mortgage, and a sale and conveyance of its rights in the property. An act was passed in 1868, entitled "An act for the sale of the Pacific Railroad and to foreclose the state's lien thereon, and to amend the charter thereof," the first section of which required the governor to sell the Pacific Railroad according to the provisions of the act of 1851, it being provided that the price for which the road might be sold at public auction should not be less than $8,350,000, payable to the state treasurer in bonds of the state or in money, within ninety days from the day of sale, and if such sum should not be realized, the governor should buy the road for and in the name of the state. And it was provided that if any other person than the state should purchase the road, then the state should assume and pay the principal and interest due, or to become due, on the $700,000 bonds issued by the county of St. Louis, and also $650,000 of the floating debt of the company. The purchaser must also bind himself to change the gauge of the road its entire length within ten years from the date of sale, so as to conform to the gauge of the Union Pacific Railroad Company; it was further provided, that if the company should, within ninety days from April 1, 1868, pay into the state treasury the sum of $350,000 in bonds of the state or in money, then the governor should not advertise the road for sale—and on the payment of $5,000,000, in cash or state bonds, within ninety days thereafter, then the governor was to deliver to the road a release of all state claims. These amounts were paid at the time specified,

and Governor Fletcher delivered the release as provided by law.

The orators then declare that the price paid by the company in liquidation of the debt was largely in excess of the true value of the property mortgaged, and as a means of paying the Dresden bonds, of purchasing iron and rolling stock, and paying off the floating debt, and especially to raise the funds to pay the balance of the sum due the state, $4,650,000, the company, July 15, 1868, mortgaged to complainants and one James Punnett (now deceased), the entire line of the Pacific road from Fourteenth street in St. Louis, to Kansas City, to hold in trust for the use and benefit of the holders of the bonds to be issued according to conditions of the said mortgage, on condition that if the company should pay said bonds and interest, the mortgage should be void, but on failure to do these things, they should be authorized, on the written request of any one bondholder, to cause the property to be advertised and sold in St. Louis, for cash, on ninety days notice. Said trustees accepted the trust, but since that time Mr. Punnett died, and his vacancy has not been filled. These purchasers, it is averred, would not have purchased said bonds had they entertained any doubt as to the constitutionality of the law authorizing them so to do—and the general assembly has held five sessions since that conveyance, and has raised no objections to the act aforesaid; and during that time the railroad bonds were being sold and transferred from hand to hand until half of them were gone; so the investment made by the complainants was made in full confidence as to the good faith of the state. The mortgage was executed to complainants in July, 1868, and since then the railroad Company have issued other bonds amounting to $3,000,000, at seven per cent, the proceeds being used to make valuable improvements, besides which the Company have purchased valuable

real estate in the city of St. Louis, and made several other large expenditures in good faith.

The bill charges Governor Woodson and Attorney General Ewing, with combining and confederating with parties unknown to your orators, "how to injure and wrong your orators and the bondholders, whom they represent under the deed aforesaid, have threatened and do now threaten to cause the whole of said railroad to be advertised for sale, to satisfy supposed claims due the state under the acts granting aid as aforesaid; and that the governor's acts have already caused great decline in all the bonds and other securities issued by said company, and have aroused the most serious apprehensions and alarm among the holders thereof—all this on the ground that the lien of the state on said road exists in full force, notwithstanding the provisions of the act of the 31st of March, 1868; also pretending that the authority to advertise the road for sale as conferred by the act of 1851, is still in force, and that the act of 1868 only repeats its authority so to do.

The orators declare that these pretensions are unfounded, as also is the claim that the company is indebted to the state for interest paid on the bonds of the state issued as aforesaid to the company. The governor also pretends he is authorized to sell the road by the provisions of a resolution passed by the general assembly, March 21, 1873, by which the attorney general is authorized to institute proceedings for the purpose of testing the constitutionality of the law of March 31, 1868, before the supreme court of the state.

And so the orators pray the court to grant them a writ of injunction restraining defendants from advertising or selling the road, or any part thereof, and to grant such other relief as the necessities of the case require.

To this bill the governor and attorney general filed an answer, in substance, alleging that ten millions and a half

of state bonds of Missouri were loaned to the Pacific railroad company, under the acts of 1851–53–55–57, some of them having twenty years to run, and others thirty years, with coupons attached for the payment of semi-annual interest, at six per cent per annum. That the company had never paid either principal or interest on said bonds; that the company had sold said bonds to *bona fide* holders, for value, in 1852–53–54–55–56–57–58, all of said bonds being secured by a first lien on said railroad and its appurtenances, the company being bound to pay all the coupons and the bonds when they respectively become due. That the state was not liable for any damage or loss of the company by reason of the war of the rebellion. *That the fifth section of the act of the* 31*st of March*, 1868, *is unconstitutional and void*, being in direct conflict with the fourth section of an ordinance for the payment of state and railroad indebtedness, adopted by the convention on the 8th of April, and by the people of the state on the 6th of June, 1865, and also in conflict with the constitution adopted at the same time. That the *bona fide* holders of said state bonds could not be prejudiced by the said act of 1868, or any other act of legislation affecting the validity of a contract created by the said acts, loaning the said ten and a half millions of state bonds to the railroad company, secured by a statutory mortgage, which was the first lien upon the said Pacific railroad and its appurtenances. That said bondholders were entitled to said first lien, and to insist that the road should be sold by the governor of Missouri to provide means for the payment of said bonds. That the five million dollars paid by the company to the state, under the act of 1868, should be applied to the liquidation of the interest then due the state on the coupons that had been paid by the state. That the interest due the state was then largely in excess of the sum of said five million dollars, and that

the governor was bound to sell the said road and its appurtenances under the statutes of Missouri.

James Baker and *John B. Henderson*, for the plaintiff.

H. Clay Ewing, attorney general of Missouri, and *Hill & Bowman*, for the defendant.

DILLON, *Circuit Judge*.—In 1851, and at various times between that year and 1855, the general assembly of the state of Missouri passed acts loaning the credit of the state to the Pacific railroad, to the Southwest Branch thereof, to the Hannibal & St. Joseph railroad, to the Iron Mountain railroad, and other railroad companies. The present case relates alone to the [Missouri] Pacific railroad, whose line extends from St. Louis to Kansas City. The object of the legislation was to secure the completion of the roads. The form in which the aid was extended was this: The state made its bonds, promising to pay the amounts thereof to the company or its order, with coupons attached; and by the act "the faith and credit of the state were pledged for the payment of the interest and the redemption of the principal of the said bonds." (Act of February 22, 1851.)

The company was, by the act, to make provision for the punctual payment of the interest and principal of the bonds so issued by the state, so as to exonerate the state from advances of money for that purpose. To secure this undertaking on the part of the company, the act provided that the net tolls and income of the road should be pledged for the payment of interest, and that the acceptance of the bonds by the company "should become and be, to all intends and purposes, a *mortgage* of the road of the company, and every part and section thereof, and its appurtenances, to the people of the state, for securing the payment of the principal and interest of the sums of money for which such

bonds shall, from time to time, be issued and accepted as aforesaid."

This was to be the first lien, or mortgage on the road, and it was further provided by the act that if the company should make default in the payment of either principal or interest, no more bonds should be issued to it, and it should be lawful for the governor to sell the road and its appurtenances, at auction, to the highest bidder, on six months' notice; or to buy in the same, at such sale, for the state, subject to such disposition of the road or its proceeds as the legislature might thereafter direct. (Act of February 22, 1851.)

Under these provisions as to security, it is admitted in the bill, that state bonds were, from time to time, issued for the benefit of the Pacific railroad, to the extent of $7,000,000. The answer asserts that the amount thus issued was over $10,000,000. The acts of the legislature referred to would seem to show that about $10,000,000 of bonds were issued to the Pacific railroad, but part of this amount was for the Southwest Branch (now the Atlantic & Pacific railroad), and secured on that road alone, leaving $7,000,000 to the Pacific road proper. It is not regarded as necessary on this application to determine whether the averment of the bill or of the answer as to the exact amount of bonds issued to the Pacific railroad is correct.

In 1864, the road not being completed, the legislature of Missouri authorized the company to borrow $1,500,000, payable in four, five, and six years, and to secure it by a *first* lien on the road *west of Dresden*—the state waiving, for this purpose, and to this extent, its priority of lien.

In 1866 the road was finished and put in running order to the west line of the state, but in order to effect this the company had, in 1865, received aid from St. Louis county to the amount of $700,000. On the 31st day of March, 1868, the act was passed the validity of which so far as re-

lates to its fifth section is the only question which this case on its merits presents. At this time the road is stated in the bill to have been in bad condition as to repairs and equipments, and the company owed a floating debt of $1,092,848, an unadjusted debt of about $200,000, and the first instalment of the Dresden bonds, amounting to $500,000. Of its stock, $3,614,500 was held by citizens and municipalities of Missouri—over $2,000,000 by St. Louis city and county, or tax-payers therein. The company had failed, since July, 1859, to pay interest on the state bonds.

Meanwhile the new constitution of the state had been adopted, which went into effect July 4, 1865. In the body of the constitution (article XI. sec. 15), is this provision: "*The general assembly shall have no power, for any purpose whatever, to release the lien held by the state upon the railroad.*" In addition to this a constitutional "ordinance for the payment of state and railroad indebtedness" had been adopted which went into effect June 6, 1865. This ordinance provided for the levy of a heavy annual tax upon the Pacific railroad and other roads, to be "appropriated to the payment of principal and interest now due, or hereafter to become due, upon the bonds of the state, or the bonds guaranteed by the state, issued to the aforesaid railroad companies."

By the *fourth* section of the ordinance it is provided, that "Should either of said companies refuse or neglect to pay said tax as herein required, and the interest or principal of any of said bonds, or any part thereof, remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchises of the company that shall be thus in default, under the lien reserved to the state, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company." And the *fifth* section of this ordinance provides that "Whenever the state shall

become the purchaser of any railroad, or other property, or the franchises sold as hereinbefore provided for, the general assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the railroad company in default, but no railroad or other property, or franchises purchased by the state, shall be restored to any such company until it shall have first paid in money, or in Missouri state bonds, or in bonds guaranteed by the state, all interest due from said company; and all interest thereafter accruing shall be paid semi-annually in advance, and no sale or other disposition of any such railroad or other property, or their franchises, shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money or in the bonds or other obligations of the state."

With these provisions of the constitution and constitutional ordinance in force, and in this condition of the company as respects its road and its indebtedness to the state and to others, the legislature passed the act of March 31, 1868. (Laws 1868, p. 114.) This act is entitled "An act for the sale of the Pacific railroad, and to foreclose the state's lien thereon, and to amend the charter thereof."

"Sec. 1. The governor is hereby directed and required to sell the Pacific railroad and its appurtenances, and all property belonging thereto, in accordance with the provisions of section 5 of this act, and an act entitled 'An act to expedite the construction of the Pacific railroad and of the Hannibal & St. Joseph railroad,' approved February 22, 1851.

"Sec. 2. Upon the sale of the road, as provided in the foregoing section, the price and the sum for which the same shall be sold shall not be less than eight millions and three hundred and fifty thousand dollars, payable to the state

treasurer, in bonds of this state or in money, within ninety days from the date of sale. No bid, except the bid of the governor on behalf of the state, shall be accepted, unless there is paid to the state treasurer, who shall attend the sale, an amount of not less than three hundred thousand dollars in such bonds or money, as a part of the purchase money, to be paid when the road is stricken off; and such bonds or money shall be forfeited to the state in case the purchaser or purchasers shall fail to pay the amount of purchase money bid within the time above provided for. Such sale shall take place at the east front door of the court house, in the city of St. Louis, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon.

"If said sum of eight millions three hundred and fifty thousand dollars is not realized at such sale, the governor shall, by himself or agent, buy in the same for and in the name of the state of Missouri."

Section 3 is not important in the questions before the court.

"SEC. 4. Upon the payment of all the purchase money as specified in section 2 of this act, and upon the delivery of an obligation in conformity with section 3 of this act, the governor shall execute a deed to the purchaser or purchasers, conveying all such right, title, and interest, in and to said Pacific railroad, its franchises, appurtenances, and the property belonging thereto, as are subject to the lien of this state."

Then follows section 5, which is the one on which the principal question made in this case turns: —

"SEC. 5. If the Pacific railroad shall, at any time within ninety days after the first day of April, 1868, pay into the treasury of the state the sum of three hundred and fifty thousand dollars, in the bonds of this state or in money, then, and in that event, the governor shall not advertise

said road for sale; and if the said company shall, within ninety days thereafter, pay into the state treasury an additional sum equal to five millions of dollars in all (the same being either in cash or Missouri state bonds), the governor shall, upon the production of the receipts of the state treasurer for said amounts, execute and deliver to the said Pacific railroad company a deed of release for all claims, title, and interest, which the state of Missouri has in and to the said Pacific railroad, its property and appurtenances; and the said Pacific railroad company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due to the state, and all liability growing out of the issue of the bonds of the state to aid in the construction of said road, and no sale shall, in that event, take place under this act. If, however, for any cause, the said company shall be unable to pay the additional sum as herein provided, the governor shall proceed to advertise said road; but if the said company shall, during the pendency of said advertisement, pay into the state treasury the additional sum, with interest thereon from the first day of October, 1868, at the rate of six per cent per annum, then, and in that case, no sale of said road shall take place, and the governor shall execute and deliver to the said Pacific railroad company the deed of conveyance and release provided for in this act, and the said Pacific railroad company shall be exempt from all the liabilities and obligations herein specified; but in case the said company shall, after the payment of three hundred and fifty thousand dollars above stated, fail to pay the additional sum specified (being the remainder of the five millions), then, and in that case, the sum first paid shall be forfeited to the state."

It is admitted that the company within ninety days paid into the state treasury the $350,000, and within ninety days thereafter, the balance of the $5,000,000, and received

a deed from the governor in pursuance of the act releasing and discharging it and its property from all liens and claims on the part of the state, and from all liability growing out of the issue of the bonds of the state to aid in the construction of its road.

In order to retire the Dresden bonds and to raise the $5,000,000 to be paid to the state and to put its road in repair, the company, on July 15th, 1868, made a mortgage to the plaintiffs as trustees, to secure $7,000,000 of bonds. This mortgage recites the act of March 31, 1868, and it was the professed intention to make it after the payment of the $5,000,000 to the state, and upon payment of the Dresden bonds a *first lien* on the entire Pacific road, its property and franchises. Subsequently, on July 1, 1871, a second mortgage was made by the company for $3,000,000, the proceeds of which it is alleged were exclusively used in improving the road and in purchasing rolling stock. Both of these mortgages are outstanding and unpaid, as also another mortgage for $800,000 secured upon certain lands in St. Louis purchased for depot purposes.

In March, 1873, the general assembly of Missouri adopted a concurrent resolution reciting that grave doubts had arisen as to the constitutionality of the act of March 31, 1868, and directing the attorney general of the state "to institute and prosecute all suits and other proceedings at law and in equity requisite and necessary for the purpose of testing and causing to be determined by the supreme court of the state of Missouri, the constitutionality of said act, and to institute and prosecute such suits and proceedings at law and in equity as may be requisite and necessary to protect and enforce all the rights, interests, and claims of the state against the Pacific railroad (of Missouri)."

Under this authority, the governor, by the advice of the attorney general and his associate counsel, has resolved to proceed, not by suit, but by advertising the road and its ap-

purtenances for sale under the original statutory lien in favor of the state. This proceeding on the part of the state authorities assumes that the fifth section of the act of March 31, 1868, is unconstitutional; that the statutory lien of the state is yet in full force, and that it is the first lien on the Pacific road, its property, and appurtenances; and if this assumption is well founded in point of law, the proposed sale, if made, would cut off the mortgage to the plaintiffs, and the rights of the holders of the seven millions of bonds secured thereby. On the other hand, if the fifth section of the act of March 31, 1868, is not unconstitutional, then the state has no lien to be enforced, and the proposed sale, if made, would be wholly nugatory.

On the merits, the controlling question in the case, therefore, is, whether the fifth section of the act of 1868 violates some provision of the constitution or constitutional ordinance of the state.

Before reaching this question, some objections of a preliminary nature to the case made by the bill must be determined.

1. It is insisted by the attorney general of the state and his associate counsel that the *plaintiffs have no sufficient authority, interest, or title, to enable them to maintain this suit or ask the relief sought.* The plaintiffs are the trustees of the bondholders under the mortgage of July 15, 1868, for $7,000,000. The bondholders are numerous and widely scattered, and the plaintiffs holding the title to the railroad and property mortgaged to secure the bonds have a right, as representing the bondholders, to apply for judicial intervention to have the respective rights of the state and of themselves settled before any sale is made or attempted. If they are right in the position they take in the bill the state is wrong, and has no right to sell the road or offer to sell it. The effect of advertising the road for sale by the governor, under the advice of the attorney general and the able counsel associated

with him, could not be otherwise than seriously to depreciate the value of the bonds secured by the mortgage to the plaintiffs; and this injurious effect would be greatly increased if a sale were actually to be made in advance of a legal determination of the respective rights of the parties.

2. The next objection relates to the *parties defendant.*

It is insisted that "The governor and attorney general of Missouri cannot be enjoined in the federal court from proceeding under the statutes of the state to foreclose the state lien, unless those statutes are in conflict with the constitution of the United States."

This statement of the objection, taken from the brief of the learned counsel for the state, concedes, by implication, that if the statutes of the state do conflict with the federal constitution then the federal courts may, in a proper case, enjoin the agents or officers of the state. The mere fact that a state officer, whatever may be his grade, is a party, does not defeat the equity jurisdiction of the United States circuit court, although the state may be the real party in interest, and cannot, as such, be brought before the court. This was decided by the supreme court of the United States in the case of *Osborne* v. *The Bank of the United States*, 9 Wheat. 783, and the doctrine has been frequently reaffirmed. It was asserted and applied by that tribunal during the present year, in the case of *Davis, Governor of Texas*, v. *Gray, Receiver of the Memphis, El Paso & Pacific Railroad Company.* The cases are there cited by Mr. Justice Swayne, and there is no call upon us to go over the same ground. In the case before us the state of Missouri is asserting simply the right of a creditor, or lien-holder, and not any right in her sovereign character. In the language of the supreme court of Missouri, "The governor, in the sale of the roads, is not acting in his political or executive capacity; he is not carrying out any of the powers delegated by the constitution; he is simply acting as a special agent, in obedience to power com-

mitted to him by an act of the legislature, which saw proper to intrust him with the particular function; but it might have devolved the duty upon any other person as well." (*State* v. *McKay*, 43 Mo. 599.)

If the fifth section of the act of March 31, 1868, is constitutional, it, and the proceedings had under it, and the deed of the governor, do constitute a *contract* between the state of Missouri and the company, which is under the protection of that provision of the constitution of the United States which prohibits a state from passing "any law impairing the obligation of contracts." (Art. 1, sec. 10.) If that contract is valid, or the deed of the governor in 1868 to the company is effectual, any attempt by the governor, under the concurrent resolution of March 21, 1873, to enforce a lien which was satisfied, would be in violation of the rights of the company and its mortgage bondholders, and presents a fitting and proper case for the cognizance of the federal tribunals.

3. We are thus brought to the substantial question in the case, viz: the *constitutionality* of the fifth section of the act of 1868. We proceed to notice the several grounds upon which the state claims this section to be in violation of the constitution. It is urged that it is void because it was a *special law*, in contravention of the last clause of sec. 27 of art. 4 of the constitution, by which it is provided that "The General Assembly shall pass no *special law* for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, *and for all other cases where a general law can be made applicable.*"

It is a sufficient answer to this objection to state that this is not one of the enumerated cases, and that the supreme court of the state of Missouri has recently decided that it is for the legislature, and not for the courts, to determine when a general law can be made applicable: *State* v. *County Court of Boone County*, 50 Mo. 317. And such seems to be

the prevailing view elsewhere taken: Cooley, Const. Lim. 129, note; Dillon, Munic. Corp. sec. 26, and cases cited.

It is next insisted that the fifth section of the act of 1868 is void, because it violates section 32 of article 4 of the constitution of Missouri, which provides that "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed." The title of the act of 1868 is, "An act for the sale of the Pacific Railroad, and to foreclose the state's lien thereon, and to amend the charter thereof." Similar provisions exist in many of the state constitutions, and they have been often construed to require only the general purpose (which must be a single one) of the statute to be fairly indicated by its title. (Cooley, Const. Lim. 141-144; Dillon, Munic. Corp. sec. 28, and cases cited.) Different and incongruous subjects are not brought together in the act of 1868, but the provisions as to the sale of the road, and the foreclosure of the state's lien thereon, relate to but one subject within the meaning of the constitutional provision, and this subject is expressed in the title. The manner in which the lien of the state may be foreclosed will be considered hereafter.

It is next urged that the statutory lien in favor of the state was reserved by it, not exclusively for its own indemnity, but for the benefit of the holders of *its* bonds, and therefore the state, holding the lien merely as a trustee for its bondholders, could not release such lien while its bonds were outstanding, as they still are. None of the holders of these bonds are here, and it is not needful that we should inquire what *equities* they might have should the state refuse to pay them, and should they apply for relief against the railroad company or its property. I am inclined to think, however, that the form of the transaction indicates the intention of the parties.

The state issued its bonds, and these were negotiated and taken upon the state's "faith and credit," without any accompanying security. To indemnify itself, the state provided for, and received, a mortgage upon the road of the company, and a pledge of its net tolls and income. Then comes the further provision that the companies shall punctually pay the interest and principal of the bonds, but if they fail to do so, the state may sell the road to others, or buy it in itself, to be thereafter disposed of as the legislature may direct.

It could not be maintained, we think, that if a sale were made by the state to a third person, that he would take it subject to a lien in favor of the holders of the bonds of the state. Such a view seems to be inconsistent with the provisions of the act under which the aid was given, and the lien reserved to the state, with the provisions of the fourth and fifth sections of the constitutional ordinance, as expounded by the supreme judges (37 Mo. 129, 134), and with the entire state legislation on the subject of disposing of roads purchased by the state under the lien reserved to it. The judges, in their answer to the governor, distinctly say, that "When the state becomes the purchaser of the railroad, under the lien reserved, both the lien and the former company are extinguished. The state remains liable for her own bonds, and owns the railroad, and the state may sell it without reserving a lien for the whole indebtedness of the former company, but only for the unpaid balance of the purchase money." (37 Mo. 134.)

But the principal objection to the fifth section of the act of March 31, 1868, is, that it is in conflict with section 4 of the constitutional ordinance, and with section 15 of article 11 of the constitution, before quoted. The constitutional ordinance, in the event of the default therein specified, directs that "the general assembly shall provide by law for the *sale* of the railroad, and other property, and the franchises of the company that shall be thus in default

under the lien reserved to the state." Section 15 of article 11 of the constitution is, that "The general assembly shall have no power, *for any purpose whatever*, to release the lien held by the state upon any railroad."

By force of these provisions, it is insisted by the counsel in the interest of the state: 1. That the state legislature is thereby prohibited from making or authorizing any sale, unless by *public auction*. 2. That such sale must be for the *whole amount* of the bonds of the state. And 3. That the sale or disposition to the company, under the fifth section of the act of 1868, of the interest of the state under its lien is a *release* of the lien contrary to the fifteenth section of the eleventh article of the constitution, above quoted, and that it would be so, even though the state should receive from the company the full value of the property and interests covered by its statutory mortgage.

In neither the fourth nor the fifth sections of the constitutional ordinance, nor in the body of the constitution, can be found any provision fixing the price at which the roads shall be sold, either to third persons or to the state, and if bought by the state, at what price they shall be resold to others. Of this opinion, it seems, were the state supreme judges, for, in their official answer to the governor, they say: "If the state could never sell the road without reserving a lien for the whole indebtedness of the former company to the state, she might never be able to sell at all, and so be in a worse condition than she was before." (37 Mo. 134.) There being no restriction in the constitution or organic law as to the *amount* at which the roads might be sold, it follows that this was a matter wholly within the control of the legislature, and that counsel are mistaken in supposing that any sale by the state must be for the whole amount of bonds issued or guaranteed by the state, and the interest thereon. No such construction, so far as I can discover, has ever been adopted in any legislative act, but

always the contrary one; and sales for vastly less than the lien of the state have been legislatively authorized or confirmed, and such confirmation approved by the supreme court. See, on this point, the case of *The State* v. *McKay*, (43 Mo. 594), relating to the sale by the state of the Iron Mountain road. Accordingly this very act of March 31, 1868, provided, if $8,350,000 should not be bid or realized at the sale, that the governor should buy in the road in the name of the state; and the state, in case a sale was made, assumed $700,000 and interest due on the bonds issued by the county of St. Louis, and also $650,000 of the floating debt of the company. The state therefore authorized a sale of this road for $7,000,000 net, which was confessedly some millions less than the amount for which the company is liable on account of the state bonds. It can scarcely be doubted if such a sale had been made that the purchaser would have obtained, as against the state, a perfect title, and yet the state would have received but $7,000,000.

The practical effect of such a sale would have been to annihilate all the stock and all the interest of the stockholders in the road. The stock of counties and municipalities of the state, obtained in exchange for their bonds, would have been sacrificed, except the amount assumed for St. Louis county. The floating debt of the company, except the portion assumed by the state, would never have been paid.

But such a sale was not made, for by the fifth section of the act the company, in consideration of $5,000,000 paid to the state, received a "full discharge from all claims or debts due the state, and all liability growing out of the issue of the bonds of the state to aid in the construction of its road." This left the corporation *in esse*—preserved the stock and the interests of the stockholders—and gave to the unsecured creditors of the company the opportunity to obtain payment from it. If it were in the province of the

court to pass judgment as to whether it were better to have sold to others outright for $7,000,000 net, with the consequences above pointed out, or to the company for $5,000,000, could we say that the legislature acted unwisely in adopting the fifth section?

In examining the transaction, we must look at substance rather than form—and in effect it was a sale of the state's interest to the company for $5,000,000. The legislature had the power to order a sale, and not being restrained by the constitution, it necessarily had the power to fix the price and terms of the sale. It could have authorized the sale for $5,000,000 to a third person—why not to the company for the same amount? There being no limitation in the constitution as to the price at which the general assembly might authorize the state to sell the road or to buy it in, or to re-sell it, the amount which the state would fix upon as the value of its security would, after all, depend upon legislative judgment. If the state had purchased for the $8,350,000 it might afterwards have sold it for any price it might see fit to take, whether more or less than that sum. The state agreed to take and did receive from the company the $5,000,000. The money was raised upon the mortgage and bonds which the present plaintiffs are here to protect. This mortgage was made and the money borrowed on the faith of the action of the state, and it was by this that the $5,000,000 were secured which was paid to the state and which it still retains. It was by this means that $1,500,000 of the Dresden bonds secured by a first lien on the west sixty-five miles of the road were paid. A second mortgage for $3,000,000 was made, and the money thus borrowed is alleged, and the answer does not deny the allegation, to have been used in ironing, repairing, and equipping the road. It is plain that this money was advanced on the faith of the legislation of 1868, and this appears on the face of

the mortgage to the plaintiffs. These mortgages would have been worthless securities if it had been understood that the state still had a lien upon the road for the $7,000,000 and the nine or ten years' interest thereon, and this fact the state must be taken to have known when it received the $5,000,000, which was really the money of the bondholders and not of the company. Five sessions of the general assembly of Missouri met before any steps were taken to question the validity of the transaction in 1868; and it is manifest that that transaction cannot now be overthrown except by sacrificing the interest of men who have in good faith parted with their money on the strength of the legislation, acts, conduct, and acquiescence of the state. Looking back upon the transaction, I cannot say that the agreement to release the security of the state for $5,000,000 should, under the circumstances, and as respects the innocent mortgagees of the company, be held to be such a release as was forbidden by the constitution. The state had released or waived its first lien on the North Missouri railroad, receiving no consideration therefor, and agreed to take a second lien. This was at or about the time the constitutional convention was in session, and undoubtedly it was such a transaction that was in the contemplation of the convention and the people when they adopted the provision prohibiting the state from releasing its lien on any railroad. It was not intended to prohibit the release of a lien for full value; and of such value the legislature was left to be the judge, and with its judgment the people of the state must be content. It is urged by counsel that this view makes the constitutional provisions of little value, since it leaves it in the power of the legislature to sacrifice the interests of the people by corrupt or injudicious bargains, and the court is appealed to to prevent the sacrifice which, it is claimed, the act of 1868 decreed. But we have only to deal with the question

of legislative *power;* and the legislature, as the representative of the state as a mortgagee, and as the representative of her other interests, has full power except so far as restrained by the constitution. If it had been thought that the legislature could not have been trusted with the sale or disposition of the state's interest as to the *amount* to be received, undoubtedly additional restraints would have been imposed.

The state was not disabled from releasing its security on receiving full value for it, and of its value it was left by the constitution to be the judge—so left because there was nothing to restrain it.

I feel quite clear in the conviction that the equities of the bondholders under the plaintiffs' mortgage are superior to those of the state, and on this ground (reserving all questions of rights as between the company and the state), and on the ground that in case of controversy as to priority of lien, the priority ought to be settled before an irredeemable sale is made, I award a temporary injunction; but with leave to defendant to move to dissolve it before Mr. Justice MILLER and myself, should he be present at the September term of the court in St. Louis, or before Judge KREKEL and myself at the regular term at Jefferson city. Meanwhile, the issues may be made up and proofs taken under the rules.

NOTE.—Provision of constitution requiring subject to be expressed in title of legislative act: *State* v. *Miller*, 45 Mo. 495; *State* v. *Lafayette County Court*, 41 Mo. 39; *The People* v. *Hills*, 35 N. Y. 44; *The People* v. *The Commissioners of Highways*, 53 Barb. 70; *Chiles, et al.* v. *Monroe*, 4 Met. 72; Dillon Munic. Corp. sec. 28, and cases cited; Cooley, Const. Lim. 81, 141, and cases cited.

The New York constitution of 1846 (sec. 4, art. 7) contained the following provision: "The claims of the state against any incorporated company, to pay the interest and redeem the principal of the stock of the state loaned or advanced to such company, shall be fairly enforced,

and not released or compromised." In the case of *Darby* v. *Wright* (3 Blatchf. 170) this provision was construed, and subsequent legislation, authorizing, on certain conditions, a railroad company to issue its bonds to relay the road and complete certain improvements, and providing that such bonds should have *priority* of lien over the mortgage to the state, was sustained. The opinion of HALL, J., tends to sustain the conclusion reached in the principal case.

JUDSON *v.* MACON COUNTY.

1. To give the circuit court jurisdiction, the matter in dispute must exceed $500, and the amount in dispute is what is claimed in all the counts in the declaration upon causes of action which are properly joined, and not what is claimed in any one count.
2. There is nothing in the act of June 1, 1872 (17 Stats. at Large, 191, sec. 5), or in the statutes of Missouri, so far as applicable to the circuit court, to change the above rule. Hence a declaration with eleven counts, each count being upon a distinct coupon for $50, shows a case, as to amount, within the jurisdiction of the circuit court.

(*Before* DILLON and KREKEL, JJ.)

Jurisdiction.—Amount.—Judiciary Act.—Practice Act of June, 1, 1872.

THIS is an action by the plaintiff, a citizen of New York, against Macon county in this state, upon eleven coupons of $50 each. The petition contains eleven counts, that is, a count upon each coupon, and each count asks for judgment for $50 and interest. The petition concludes as follows: "That the several preceding causes of action amount in all to the sum of $550, for which sum, with interest and damages, the plaintiff asks judgment." To this petition the defendant demurs, on the ground that the amount sued for is below the jurisdiction of the court.

Carr & Barrow, for the demurrer.

John D. Stevenson, opposed.

DILLON, *Circuit Judge.*—As to the *amount* necessary to give this court jurisdiction in cases like the present, the provision of the judiciary act (sec. 11) is, that "The matter in dispute, exclusive of costs, must exceed the sum or value of $500." As it is clear that all of the coupons are properly suable in the same action, and as the aggregate amount of these coupons exceeds $500, it would seem quite obvious that the objection taken to the jurisdiction is not tenable. The argument urged to support the objection is this: By the act of Congress of June 1, 1872 (17 Stats. at Large, 197, sec. 5), the "mode of proceedings" in this court is required to be conformed, as nearly as practicable, to the practice of the state court, and by the statute of the state, while several causes of action on contract may be united in the same petition, yet "Each cause of action must be separately stated with the relief sought for each." (Wagner's Stats. 1012, sec. 2.)

It is contended, under this statute, that as each coupon is a separate cause of action, and must, as such, be separately stated, and that as each coupon is below $500, and as under the practice in the state court, settled by the decisions of the supreme court, there must be a separate finding as to each cause of action (36 Mo. 110; *Ib.* 215), the matter in dispute is the amount of each coupon, and no more.

The premises do not warrant the deduction sought to be drawn from them. The act of June 1, 1872, does not affect or modify the eleventh section of the judiciary act respecting the amount necessary to give this court jurisdiction; and since it is admitted that suit upon all the coupons was properly brought, and as the amount claimed upon all exceeds $500, it is plain to a demonstration that the matter in

controversy is the amount claimed upon all, and not upon any one coupon. The demurrer to the petition is overruled.

KREKEL, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—As to *amount* necessary to give jurisdiction: *King* v. *Wilson* (bill by tax-payers to enjoin illegal tax), 1 Dillon, 555, 568; *Adams* v. *Board of Commissioners, &c.* McCahon R. 235.

Construction of act of July 1, 1872: *Schabwacker* v. *Reilly, ante p.* 127; *Bronson* v. *Keokuk, post.*

Coupons how declared on; *Railroad Co.* v. *Otoe County,* 1 Dillon C. C. 338, 342, and cases cited. While it is not necessary to set out the bonds or their recitals, it is often advantageous to do so in declaring on the coupons. In *Clarke* v. *Janesville,* 1 Bissell, 98, it was held that *assumpsit* would not lie on coupons.

BANK OF COMMERCE *v.* RUSSELL, Assignee of Leonard, Dunbaugh, & Co.

1. *A creditor of a bank* which collects money and fails to pay it over, has no priority in bankruptcy over the other creditors of the bank.
2. The holder of the protested *draft* of such a bank is not entitled in bankruptcy to priority over the other creditors of the drawer, merely because the drawee (another bank) may have had funds of the drawer in its hands at the time it refused to accept the draft.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Money Held in Trust.—Equitable Assignment. —Rights of Holder of Protested Drafts of Bankrupt Bank.

THIS is an appeal from the district court for the western district, sustaining a demurrer to the bill.

The only question is as to the sufficiency of the bill of complaint. The allegations in the bill are in substance:

That the firm of Leonard, Dunbaugh, & Co. has been duly adjudged bankrupt, and the said Russel duly elected and qualified as the assignee of said firm and of each of its members; that in the months of September and October, 1870, the complainant in the course of its banking business, sent certain notes, amounting in the aggregate to $826.53, to the firm of Leonard, Dunbaugh, & Co., then engaged in the banking business at Pleasant Hill, Missouri, for collection only; that said firm collected the money; that said firm had $2,000 in the Second National Bank in St. Louis, Missouri, on deposit, subject to their draft, and in part payment of the amount collected, sent complainant a draft on the said Second National Bank for $413.16 as a portion of the money collected; and that said draft was presented, payment demanded and refused, and protested; that said assignee has received from the estate of said firm of Leonard, Dunbaugh, & Co. the sum of $82,653, and has the same in possession, and that he has received and has in his possession the said sum of $2,000 so deposited in the said Second National Bank, on which said draft was drawn. It is further averred that the money so collected was collected and received by said firm as the agent of complainant, and in special trust and confidence, and was in no wise a part of the estate of said firm. It is also averred that all the members of said firm, as well as the firm, have been adjudged bankrupt, and that the assets are insufficient to pay the debts, and that complainant is without remedy at law. The prayer is that the said assignee be required to set apart and pay over to complainant the money so collected out of the assets of said firm of Leonard, Dunbaugh, & Co. and for general relief. The plaintiff appeals.

DILLON, *Circuit Judge.*—The bank which files the bill seeks to maintain it on two grounds. The first is that the money collected for it by the bankrupts is money which

they held in trust for it, and hence that it did not vest in the assignee.

I am of opinion upon the statements of the bill that this principle does not apply, and that the relation between the bankrupts and the plaintiff at the time of the bankruptcy was simply the relation of debtor and creditor. It does not appear that the identical money collected on the notes was kept by the bankrupts separate and distinct from their other money, and in that shape came into the hands of the assignee. We need not, therefore, consider what would have been the rights of the parties had this been shown.

It is next claimed that the draft drawn by the bankrupts for $413.16 on the Second National Bank, where they had at the time $2,000 on deposit, and which draft was protested, amounted to an equitable assignment of that amount in favor of the plaintiff, and that this equity should be judicially recognized and enforced as against the assignee. If it were assumed or conceded that under any circumstances such a draft can amount to an equitable assignment in favor of the payee of that amount of the drawers' funds in the hands of the drawee, such a principle can not be applied where it would contravene the purpose of the bankrupt act. The plaintiffs, as the holders of the draft drawn by the bankrupts, were simply creditors like other draft-holders, and it would scarcely do to say that when private bankers become insolvent, holders of their bills shall, to the extent of funds in the hands of the drawee, be entitled, as against other creditors, to priority.

AFFIRMED.

NOTE.—An *ordinary draft for part of a fund is not an assignment* of the fund *pro tanto* unless assented to, or unless there be an obligation to accept, express or implied. *Mandeville* v. *Welch*, 5 Wheat. 277, 286.

In relation to *ordinary checks* on bankers, the same doctrine has been frequently held. *Bullard* v. *Randall*, 1 Gray, 605; 2 Parsons on Notes and Bills, 61. And this is the doctrine of the supreme court of the United

States. *Bank of the Republic* v. *Millard,* 10 Wall. 152. But as to such checks the contrary has been sometimes held: *Fogarties* v. *Bank,* 12 Rich. (South Car.) Law, 518; *Munn* v. *Burch,* 25 Ill. 35; *Roberts* v. *Corbin,* 26 Iowa, 315; but it is expressly stated in this last case that the doctrine is limited to *checks* and, and does not extend to bills of exchange; *Ib.* 326.

The cases on the subject will be found mostly collected in 2 Parsons on Notes and Bills 61, and referred to in those above cited. The principal cases are also cited by Mr. Justice DAVIS, in his opinion in the *Bank of the Republic* v. *Millard, supra.*

REPORTS

OF

CASES DETERMINED

IN THE

Circuit Court of the United States,

FOR THE

EASTERN DISTRICT OF ARKANSAS.

UNITED STATES *v.* POWELL CLAYTON.

1. The governor of a state is not "an officer of election" within the meaning of section 22 of the act of Congress of May 31, 1870 (16 Stats. at Large, 145), which makes it criminal for any "*election* officer" fraudulently to make any false certificate of the result of any congressional election.
2. Rules by which courts arrive at the intention of the legislature in construing criminal statutes, stated and applied.
3. Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms.
4. In statutes creating and defining criminal offences, the courts will not, by construction, engraft words in one section upon those of another, unless the legislative intention be plain and clear.
5. The relations of a state to the general government, and of the governor to both, referred to as showing the improbability that congress would (if its power be conceded), provide for the trial and imprisonment of this officer for omitting or fraudulently performing election duties prescribed by *state* laws.

[NOTE. — In the Western District of Arkansas, the district court has circuit court powers.]

(*Before* DILLON and CALDWELL, JJ.)

Elections. — Act of May 31, 1870.—*Governor of State not an "Election Officer."—Rules for Construing Statutes.*

THE indictment in this case was presented at the April term, 1871, and is founded upon section 22 of the act of Congress of May 31, 1870 (16 Stats. at Large, 145). A demurrer thereto is filed. The indictment is, in substance, as follows: That on November 8, 1870, an election was holden under the laws of Arkansas in the several counties (naming them) constituting the third congressional district of the state, to elect a representative in the Congress of the United States; that Thomas Boles and John Edwards were respectively candidates for that office, and voted for at said election; that abstracts duly made and certified by the county clerks of the said counties composing the congressional district, of the returns of said election in the various election districts (duly made to said county clerks by the judges and clerks of said election), showing the number of votes cast respectively for Boles and Edwards, were filed in the office of the secretary of state; that on said 8th day of November, 1870, and for four months thereafter, the defendant, Clayton, was the governor of the state of Arkansas, charged with the duty of making and granting the certificate hereinafter mentioned; that during said period one Robert J. T. White was secretary of state; that December 1, 1870, said White, in the presence of the defendant, Clayton, as governor, did duly cast up and arrange the said votes from the said several counties so returned as aforesaid; that on February 20, 1870, the defendant, as governor, did willfully, unlawfully, and fraudulently make and grant, under the seal of state, and deliver to said Edwards a certificate, stating therein "that it appears from the returns made to the office of the secretary of state, that at an election held, etc., John Edwards was duly elected in the third congressional district to

represent the state of Arkansas in the forty-second Congress of the United States." The indictment then alleges that the said certificate was false and fraudulent, and that, "in truth and fact, it did not appear, at the time it was made, by and upon said returns so made as aforesaid, that said Edwards was elected; but, on the contrary, it did, then and there, as aforesaid, appear by said returns that the said Boles was duly elected by a majority of one hundred votes, all of which said Clayton well knew, contrary," etc.

The election laws of the state of Arkansas, in substance, provide that the governor shall appoint registrars of election; that the board of registrars shall appoint the judges of election, and the judges, the clerks of election. The judges certify to the number of votes given to each person, which is attested by the clerks. The judges are to transmit the poll books to the county clerks "within three days *after* the closing of the polls." "On the fifth day *after* the election the county clerks are to open and compare the returns and make abstracts of the votes given for the several candidates, and send certified copies of the abstracts to the secretary of state." The act provides that "It shall be the duty of the secretary of state, in the presence of the governor, within thirty days, or sooner if all the returns are received, *to cast up and arrange* the votes from the several counties for the persons voted for for members of Congress; and the governor shall, immediately thereafter, issue his proclamation declaring the person having received the highest number of votes to be duly elected to Congress, *and shall grant a certificate thereof*, under the seal of the state, to the person so elected." (Laws of Arkansas, 1868, 314, 325.)

In support of the demurrer, it was argued by the defendant's counsel that the indictment is insufficient in law: —

1. Because it does not allege that the defendant was an *election officer*.

2. Because it does not allege what the result was of the

casting up and arranging of the votes by the secretary of state, and that the certificate issued to Edwards was false according to the result ascertained by the secretary of state, the only allegation in this regard being that it was false as appears by the returns on file.

3. Because, within the meaning of section 22 of the act of Congress of May 31, 1870, upon which the indictment is framed, the defendant, being the governor of the state, was not *an officer of the congressional election* mentioned in the indictment.

4. Because it is not within the *constitutional powers* of Congress to provide for the punishment of the defendant, the chief executive officer of the state, in respect of acts and duties performed by him as such executive under the laws of the state.

Mr. Harrington, District Attorney, with whom was *Mr. Whipple*, *Mr. Thompson*, and *Mr. Barnes*, for the United States.

Mr. Wilshire, *Mr. Gantt*, *Mr. Warwick*, and *Mr. Yonley*, for the defendant.

DILLON, *Circuit Judge.*—The indictment against the defendant, who was at the time of issuing the certificate of election to Edwards, the governor of the state of Arkansas, is founded upon section 22 of the act of congress of May 31, 1870. (16 Stats. at Large, 145.) The amendatory act of February 28, 1871 (*ib.* 433), does not apply to the case, since the indictment is for an act committed before its passage, and is not based upon section 20, which this last-named statute amends, but alone upon section 22, above-mentioned. This section provides, "*That any officer of any election* at which any representative or delegate in the congress of the United States shall be voted for, whether such *officer of election* be appointed or created by or under any law or authority

of the United States, or by or under any state, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election, or the result thereof; or *fraudulently make any false certificate of the result of such election* in regard to such representative or delegate, * * shall be deemed guilty of a crime, and liable to prosecution and punishment therefor," by fine or imprisonment, or both.

The indictment necessarily proceeds upon the theory that the defendant, although the act charged against him was one required by the laws of the state to be done by him in the capacity of governor, was, within the meaning of the act of Congress just quoted, an *officer of election*, and as such, issued and delivered to Edwards the certificate of election, which is alleged to be fraudulent. Accordingly, one of the counsel for the government well observed on the argument that the decisive question here was, whether the defendant, within the intention of congress, was, or was not, an *election* officer, and acting as such in making and delivering the election certificate set out in the indictment. If he is not an *election* officer, it was admitted that the indictment against him would not lie. To this fundametal inquiry, then, we first direct our attention; for, if this question be resolved against the government, that is an end of the case, and it is unnecessary to consider whether Congress has the constitutional power to provide for the punishment of state officers in respect of acts performed by them as such, under state authority. And so, in this event, it would be equally unnecessary to determine whether, if the defendant were an election officer, the indictment sufficiently avers it, or charges the offence with the particularity required by the rules of criminal pleading.

The act of Congress, in the section under consideration, provides for the punishment of "any officer of election" who shall "fraudulently make any false certificate of the result of any election in regard to a representative" in Congress. The question is one as to the meaning of the phrase "officer of election" or "election officer." What was the scope of the legislative intention? Undoubtedly, this language was designed to include, and does appropriately include, local judges and clerks of election at which a representative in Congress is voted for. But did Congress mean, by this language, to include the chief executive officer of a state? Did it mean to include in any case an official act of the governor of a state, and to provide for his punishment if he shall neglect or refuse to perform any duty imposed by state laws in respect to elections for Congress, or shall violate any such duty? Did it mean to include by this description an official act of the governor, which in any case cannot be done until thirty days or more have elapsed since the election was holden and the polls closed, and which, in the case made by the indictment, was not done by him until nearly four months after the election had ended? Is the act of the governor of the state, in granting the certificate of election, the act of an election officer?

This is, as above observed, a question of legislative intention. Now, in what manner do the courts ascertain the legislative will? We answer, that it is ascertained primarily and chiefly by the language the legislature has used to express its meaning. We must suppose in the enactment of statutes, particularly statues so important as the one under consideration, that Congress weighed well the words it employed. In the office of interpretation, courts, particularly in statutes that create crimes, must closely regard and even cling to the language which the legislature has selected to express its purpose. And where the words

are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular or general signification. Statutes enjoin obedience to their requirements, and, unless the contrary appears, it is to be taken that the legislature did not use the words in which its commands are expressed in any unusual sense. For these reasons, whose cogency is obvious, the law is settled that in construing statutes the language used is never to be lost sight of, and the presumption is that the language is used in no extraordinary sense, but in its common, every-day meaning. When courts, in construing statutes, depart from the language employed by the legislator, they incur the risk of mistaking the legislative will, or declaring it to exist where, in truth, it has never had an expression. The legitimate function of courts is to *interpret* the legislative will, not to supplement it, or to supply it. The judiciary must limit themselves to expounding the law; they cannot make it. It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts, in the construction of statutable offences, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they shall hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. "If this rule is violated," says Chief Justice BEST, "the fate of the accused person is decided by the arbitrary discretion of the judges and not by the express authority of the laws." (*Fletcher* v. *Lord Sondes*, 3 Bing. 580.)

The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offences, but if by a latitudinarian construction they construe cases

not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism, nevertheless the doctrine is fundamental in English and American law, that there can be no constructive offences; that before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States. (*United States* v. *Morris*, 14 Pet. 464; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Sheldon*, 2 *ib.* 119. And see, also, *Ferret* v. *Atwill*, 1 Blatchf. 151, 156; Sedgw. Const. and St. Law, 324, 326, 334; 1 Bish. Cr. Law, secs. 134, 145.)

In view of these acknowledged rules of law, the question occurs: Did Congress mean, by the use of the words "officer of election" or "election officer," in the section of the statute on which the indictment is framed, to include the governor of a state? Is the governor an election officer? It seems to us not. These words are apt and usual words to describe the clerks and judges of the election, but not to describe the governor of a state. Such is not their ordinary or usual meaning. To make them apply to the executive of a state in respect to an act done a month or more after the election is closed would be a forced and unnatural meaning, and one which is not necessary in order to give the statute effect or operation. We hazard nothing in saying that in popular use no one would naturally infer that the words "officer of election" included the chief executive of a state.

Other considerations fortify the conclusion that Congress did not intend to provide for the indictment of the governor of a state. The states are integral and indestructible parts of the general government, without which it cannot exist (*Texas* v. *White*, 7 Wall. 700), and in view of this relation, and of the high position and important relation of the executive of a state to the United States, as well as to the state itself, it would seem very improbable that Congress would undertake to punish the governor for omitting or fraudulently discharging the duties enjoined by the laws of his state. The punishment by imprisonment would result in depriving the people of a state of the executive officer they had elected, and prosecutions of this kind, if authorized, could not fail frequently to lead to agitation, and disturb that harmony which should exist between the state and its people and the general government. Under the constitution (article 1, section 4), Congress has the undoubted power to provide its own officers for the holding and conduct of congressional elections, and it would most probably exercise it, if it deemed it necessary, in preference to undertaking to make or treat the governor of a state as an election officer, and to punish him through the national courts for malfeasance or nonfeasance in office. (*Kentucky* v. *Dennison*, 23 How. 66.) And especially would this seem to be so in view of the fact that the certificate of the governor is not binding upon Congress, each house of which is, by the constitution, made the judge of the elections, returns, and qualifications of its own members. (Art. 1, sec. 5.)

Admitting, for the occasion, the power of Congress to provide for the punishment of the executive of a state, as claimed by the prosecution, we repeat, that in view of the foregoing considerations, it seems to be improbable that it would undertake to exercise the power. At all events, it is impossible, on legal principles, that any

such intention should be held to exist from the use of the general words "election officers."

We have carefully considered the very able arguments which have been addressed to us to show that the governor is embraced in the more general language of sections 19 and 20 of the same act, and that, if so, these words, supposed to include the governor, should, though omitted by the legislature, be inserted by judicial engraftment into section 22, on which the indictment is founded. In answer to the argument, we deem it necessary only further to observe that the governor is not in terms named in either of those sections; that it is far from certain that they intended to embrace any official act of this officer, and, if they did, we could not, after the judgment of the supreme court, delivered by Chief Justice MARSHALL, in the *United States* v. *Wiltberger*, *supra*, enter upon the dangerous and unauthorized work of incorporating the provisions of one section of a law into another. We could never be sure that we did not put in what Congress may have purposely left out. The bill charges no indictable offence, and the demurrer thereto must be sustained.

CALDWELL, J., concurs.

DEMURRER SUSTAINED.

NOTE.—As to enjoining the governor of a state by the federal courts: *Murdock* v. *Woodson*, *ante*, 188. *Harrison* v. *Hadley*, *post*.

UNITED STATES *v.* HORNIBROOK.

(*Before* DILLON and CALDWELL, JJ.)

Per Curiam.—The game popularly known as keno is not a "lottery" within the meaning of internal revenue laws.

Mr. Whipple, United States attorney, for United States.

Messrs. Howard, Gallagher, Newton, and Hempstead, for defendant.

WILLIAM M. HARRISON *v.* OZRO A. HADLEY, Acting Governor of the State, JAMES M. JOHNSON, Secretary of State, MARSHALL L. STEPHENSON, ELHANON J. SEARLE, and JOHN T. BEARDEN.

(*Before* CALDWELL, J.)

Enforcement Act.—XIII., XIV., and XV. Amendments.—Election Contest.—Jurisdiction of United States Courts.

1. The *federal* courts have no jurisdiction in any form of action or proceeding over cases of contested elections for *state* offices, except in the single case provided for in the twenty-third section of the enforcement act (16 Stats. at Large, 140), in which the sole question touching the title to the office arises out of the denial of the right to vote to citizens on account of race, color, or previous condition of servitude.
2. The circuit courts of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States; there must also be an act of Congress expressly conferring the jurisdiction.
3. A citizen does not lose his rights because Congress has not vested in the courts of the United States original jurisdiction in cases where rights and benefits are claimed under the constitution of the United States. The state courts are open to such citizen, and in such

cases the rule of decision in a state court is the same as it would be in a United States court.

4. The court comments upon the XIII., XIV., and XV. amendments, the civil rights act, and the enforcement act, and is of the opinion, under the evidence in the case, that they do not apply to the alleged exclusion of the voters at the election in controversy, as they were not excluded on the ground of *race, color, or previous condition of servitude.*
5. Injunction denied, bill dismissed, and case distinguished from *Kellogg* v. *Warmouth*, in the district of Louisiana.

THE complainant alleges in his bill that at the general election held in this state, on the 5th day of November, 1872, there were, by law, to be voted for and elected two associate justices of the supreme court of the state, and that at said election the complainant and John T. Bearden were, in fact and in truth, duly elected to said offices, but that the respondents, acting in conjunction with the registrars, judges of election, and county clerks, in several counties in the state, have, by various illegal and fraudulent acts and practices, which are set out in the bill at great length, and with much minuteness, defrauded the complainant and said Bearden of the said offices to which they were so duly elected; that the secretary of state made an illegal and fraudulent canvass of the votes cast for said offices, by which it is made to appear that Elhanon J. Searle and Marshall L. Stephenson were elected to said offices, and that the governor of the state has illegally and fraudulently issued commissions to said Searle and Stephenson for said offices. The bill further alleges that if respondents Hadley and Johnson are not at once restrained from changing, altering, or destroying the documentary evidence in relation to said election, the same will be obliterated, defaced, or destroyed, and the complainant thereby greatly delayed, if not entirely prevented from obtaining justice.

The bill alleges that some voters, wrongfully and fraudulently deprived of the right to register and vote, were white citizens, and some of them colored citizens, but there is no

averment in the bill that the persons so wrongfully deprived, as alleged, of the right to register and vote, were so deprived on account of their "race, color, or previous condition of servitude," nor is it averred that such a number of voters were deprived of the right to vote on account of "race, color, or previous condition of servitude" as to change or alter the result of the election.

The bill prays, among other things, that the respondents, Searle and Stephenson, may be enjoined from exercising the functions and duties of the offices of associate justices of the supreme court; that the respondents, Hadley and Johnson, may be required to file in this court all the records and papers in their custody or control, pertaining to said election, and that they be enjoined from in any manner altering or destroying the same; that the respondent, Johnson, may be compelled by the order and mandamus of the court to send for and procure returns of said election from certain counties, from which it is alleged no returns have been made; that a general supervisor of election may be appointed, and that the supervisors of election, appointed under the act of June 10, 1872 (17 Stats. at Large, 348), may be required to make to such general supervisor "returns of said general election," and concludes with a prayer for general relief.

All the respondents have answered under oath. The respondents, Searle and Stephenson, deny all the material allegations of the bill, and charge that by the illegal and fraudulent acts and practices of the friends and partisans of the complainant, they were deprived of many votes, and their majority cut down, and, that but for such acts which are set out at length, and with much particularity, their majority would have been much greater than it is declared to be by the secretary of state.

The respondents, Hadley and Johnson, specifically and fully deny all the illegal and fraudulent acts charged against

them in the bill, and incorporated into their answer a demurrer to the bill, in which they assign as cause of demurrer, that the court has no jurisdiction of the case made by the bill, and that upon the face of the bill the complainant is not entitled to the relief he prays for.

The judge ordered an argument on the demurrer to the bill.

A. H. Garland, U. M. Rose, M. L. Rice, M. W. Benjamin, Gallagher & Newton, solicitors for the complainant.

T. W. D. Yonley, E. H. English, F. W. Compton, Wilshire & Allen, solicitors for the respondents.

CALDWELL, *District Judge.*—Has the circuit court of the United States jurisdiction of the case made by the bill? This question does not relate to the form of the action merely, but the demurrer challenges the jurisdiction of the court to make any adjudication in any form of action upon the facts stated in the bill.

It is not to be disguised that this is in effect a proceeding to contest in a United States court the title to a state office. And if this court has jurisdiction of this case, on the facts stated in the bill, then it has jurisdiction in all cases of contested elections, and that jurisdiction can be invoked to try every case involving a dispute as to which of two persons has been elected to any office, from the lowest township officer to the chief magistrate of the state. If such unqualified jurisdiction in this class of cases has been conferred, the court will not hesitate to assume and exercise it, however laborious and delicate it may be; but if it has not been expressly conferred by act of Congress, it can not be assumed. On a question of jurisdiction the court has no discretion; if the suitor brings his case within the jurisdiction of the court he must be heard, and if his case is not within the jurisdiction of the court, he can not be heard, no matter what the merits of his cause may be.

The question in the case before the court is not whether, under the recent amendments to the constitution, Congress might not confer, without any qualification or limitation, jurisdiction on the circuit courts of the United States, to determine a controversy between two citizens of the same state, involving the title to a state office, but the question is, Have they done so? Although Congress may possess the power under one, or all of the recent amendments to the constitution of the United States, to confer this jurisdiction on the courts of the United States, yet, if they have not done so, this court cannot exercise it.

It is an error to suppose that the courts of the United States have original jurisdiction to enforce or protect every right or privilege secured or guaranteed to the citizen by the constitution of the United States, and acts of Congress passed under its authority. For, although the constitution of the United States declares that "the judicial power shall extend to all cases in law and equity arising under this constitution and the laws of the United States," it was early decided that this provision of the constitution did not itself vest in the circuit or district courts of the United States any jurisdiction whatever, but that those courts could exercise jurisdiction only in cases in which it had been expressly conferred by Congress. Confessedly, the grant of the judicial power to the United States authorizes Congress to confer on the courts of the United States a much broader original jurisdiction than they have done. But the principle is now established that the circuit court of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States. There must also be an act of Congress expressly conferring the jurisdiction. The circuit court is a court of limited jurisdiction, and the supreme court has said that "the fair presumption is (not as with regard to a court of general jurisdiction that a cause is within its juris-

diction, unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears:" *Turner* v. *Bank of North America*, 4 Dallas, 8; *United States* v. *Hudson*, 7 Cranch, 32; *McIntire* v. *Wood*, 7 Cranch, 506; *Hubbard* v. *Northern Railroad Company*, 3 Blatchford, 84; *Ex parte Cabrera*, 1 Wash. C. C. R. 232; *Sheldon* v. *Still*, 8 How. 541; *Karrahoo* v. *Adams*, 1 Dillon, 344, 348.

It does not result that because Congress has not vested in the courts of the United States original jurisdiction in cases where rights and benefits are claimed under the constitution of the United States, and acts of Congress passed under its authority, that a citizen loses these rights and benefits. The state courts are open to him, and in such a case the rule of decision in the state courts is precisely the same that it would be in a court of the United States. In the case at bar, for instance, whatever rights or benefits the complainant may be entitled to under the constitution and laws of the United States, must be adjudged to him in the state courts. This rule is imperative, and is found in the words of the constitution, which declare, "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding."

If it is suggested that the state courts might misinterpret the constitution and laws of the United States, and a suitor in those courts might thus be deprived of the rights and privileges claimed under the constitution and laws of the United States, there is a ready and satisfactory answer. Congress has wisely provided for such a contingency, by declaring that in all such cases the judgment of the state court "may be re-examined and reversed or affirmed in the su-

preme court of the United States." Judiciary Act, section 25.

And by far the larger number of cases involving rights claimed under the constitution and laws of the United States are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment in the state courts: *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; Story on the Constitution, sec. 1702; Sargeant's Constitutional Law, 276, 277; *The Moses Taylor*, 4 Wallace, 411–430.

And a right of action given by an act of Congress "does not imply a right to sue in the courts of the United States unless it is expressed:" *Bank of the United States* v. *Devaux*, 5 Cranch, 61–86. Keeping these rules in view, let us inquire whether this court has jurisdiction of the case made by this bill.

The jurisdiction is sought to be maintained under the acts of Congress passed to enforce the provisions of the recent articles (XIII., XIV., XV.), of amendment to the constitution of the United States, and known as the "civil rights bill," approved April 9, 1866 (14 United States Stats. 27), and the "enforcement act," approved May 31, 1870 (16 United States Stats. 140), and the amendments thereto, approved February 28, 1871 (16 United States Stats. 433).

It is plain the "civil rights bill" does not confer jurisdiction on this court of the case made by the complainant's bill. It may be conceded that the terms of that act are broad enough to embrace all persons, without regard to their descent or color, but it is not pretended that the complainant in this case does not enjoy the "full and equal benefit of all laws and proceedings for the security of person or property" enjoyed by any other citizen; nor is it claimed that he is "denied, or cannot enforce in the courts of judicial tribunals of the state, any of the rights secured to him" by that act.

The fifteenth article of amendment to the constitution of the United States declares, "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation."

Congress has legislated under this article, and that legislation is found in the enforcement act. The first section of that act provides: "That all citizens of the United States who are, or shall be, otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude." Succeding sections of the act make ample provision for securing and protecting citizens otherwise qualified to vote from the deprivation of that right on account of their "race, color, or previous condition of servitude." This is done by giving to the injured party a right of civil action for damages, and punishing the guilty party, criminally, and in all such cases jurisdiction is expressly conferred on the United States courts.

The twenty-third section of the act is the only one conferring jurisdiction on this court in cases of contested elections, and that section is in these words: "That whenever any person shall be defeated or deprived of his election to any office, except elector of president or vice-president, representative or delegate in Congress, or member of a state legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover posses-

sion of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote, to citizens who so offer to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrent with the state courts, jurisdiction thereof so far as to determine the rights of the parties to such office, by reason of the denial of the right guaranteed by the fifteenth article of amendment to the constitution of the United States, and secured by this act."

This section bears upon its face evidence that it was drawn with unusual care and precision. By its terms, the jurisdiction of this court in cases touching the title to an office is expressly limited to "*cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude.*"

The language of this section is definite and precise, and is decisive of this case. Counsel who drew the bill in the argument frankly admitted complainant was unable to bring his case within the requirements of this section. It is clear from the bill itself that the alleged frauds were perpetrated without reference to the "race, color, or previous condition of servitude" of the voters or candidates, and, if perpetrated, were prompted by no other or different motive than that which ordinarily impels men to commit such crimes.

There is no other section of this or any other act of Congress from which the jurisdiction in such cases can be deduced. Congress has not attempted to confer the jurisdiction except upon the single ground specified in this section, and it is therefore needless to inquire whether, under the constitution, they might extend the jurisdiction to all or any

other cases of this nature. Of the constitutionality of the act in question I entertain no doubt.

In the argument reference was made to the case of *Kellogg* v. *Warmouth*, and others, pending in the United States circuit court for the district of Louisiana. The bill in that case is drawn with special reference to this twenty-third section, and all the necessary averments made to bring the case literally within its terms. The bill in that case charges expressly that the qualified voters who offered to vote, and whose votes were rejected, "were refused the right to vote on account of their race, color, and previous condition of servitude." And these averments are repeated in reference to every fraudulent and illegal act charged in the bill, and are assigned and relied on as the sole ground for all the relief sought and prayed for by the bill. And from the unofficial report of that case it appears that the leading counsel for the complainant (Mr. Beckwith) rested the jurisdiction on the twenty-third section of the act, and these averments in the bill, and the court grounded, as indeed it must have done, its judgment on the question of jurisdiction on this section and these allegations in the bill. Saying nothing of the form of the proceeding and the particular relief sought and granted in that case, it is clear that the facts stated in the bill brought the case exactly and literally under the twenty-third section. This the counsel for the complainant in the argment broadly conceded had not been done in this case, because the complainant could not conscientiously make the averments required by that section to confer jurisdiction. In support of the jurisdiction, one of the counsel for complainant, in the argument, read from speeches made by senators in Congress while the enforcement act was pending before that body. An examination of the official report of the proceedings of Congress discloses the fact that the particular section of the bill to which those speeches related was afterwards stricken

out and is not now found in the act. Indeed, if anything was wanting to show that Congress never designed to confer on the courts of the United States jurisdiction in this class of cases, beyond the single case covered by the twenty-third section, it would be found in the legislative history of this measure. See Cong. Globe, 2d session, 41 Congress, p. 3561, where the principle of giving jurisdiction to United States courts in this class of cases is first broached in section 5 of the bill there set out. It was much discussed by senators, and finally, with the consent of the chairman of the committee having charge of the bill, it was stricken out. (*Ib.* pp. 3570, 3654.) Subsequently it was renewed by Senator Carpenter, in an amendment proposed by him (*ib.* p. 3680), and his proposition, after a modification, making it in legal effect what the twenty-third section now is, was adopted by the senate (*ib.* p. 3680), and passed that body (*ib.* p. 3690).

The house not concurring in the amendments made by the senate, the bill went to a committee of conference, where the principle of conferring on the courts of the United States jurisdiction in contested elections, in any case, was specially considered, and the twenty-third section, as it now stands, was the result of that consideration, as is shown by the report of the committee to each house. The chairman of the committee of conference on the part of the senate, in reporting the action of the committee to the senate, referred particularly to the twenty-third section, and said: "The committee of conference have redrawn the section [23] very carefully, narrowing it down to the particular issue where the right to vote is denied for that specific reason (race, color, or previous condition of servitude), not drawing anything else before the United States courts, and for the purpose of giving effect to this fifteenth amendment." (*Ib.* p. 3753.)

The chairman of the committee of conference on the

part of the house, in reporting the action of the committee to the house, after quoting the twenty-third section as it now stands in the statute, said: "I should have preferred, because I do not deem it essential to the success of this measure, that the senate had not raised this question with the house of contesting any election in the [United States] courts; but having raised it, I am content to enact the provision with the limitation now put on it (into a law), and leave it thus forevermore, assured as I am that it can work no possible harm, because in any event and in every event it leaves in the courts of the United States no power save to determine *the single question where the person offering his vote shall have it rejected simply on the ground that his right, guaranteed under the fifteenth amendment to the constitution of the United States, is denied.* * * * I do not believe, under any possible condition of things, it would be necessary, as the constitution now stands, to vest in any of the courts of the United States any jurisdiction over the question of contested elections, beyond the express jurisdiction with the express limitation contained in the twenty-third section of the report." (*Ib.* p. 3872.)

It will be seen from these reports that the twenty-third section in its present form was the work of a conference committee, that embraced among its members lawyers and jurists of eminence and national reputation, who were not likely to err in interpreting the work of their own hands.

Both houses of Congress approved and assented to the views of the committee by adopting their report. The text of the act will admit of no other or different interpretation than that given it by this committee. It is not pretended that the opinions of individual legislators can be received to alter the text or control the interpretation of an act of Congress; but where, as in this case, an act has been carefully considered and revised by a conference committee, their opinions carefully and deliberately expressed, when

they accord with the plain text of the act, show very conclusively that Congress was not mistaken as to the legal effect of the language of the act, and did not intend that it should receive an interpretation different from the one plainly expressed.

It is suggested that although the court may not have jurisdiction of the principal subject matter, it may yet have jurisdiction to grant the auxiliary and ancillary relief prayed for in the bill. In answer to this suggestion it is enough to say that there is no act of Congress conferring jurisdiction to grant such auxiliary and ancillary relief, and the reasoning that excludes the jurisdiction of the court over the principal subject matter of the suit applies with equal force to the ancillary and auxiliary relief sought.

The complainant is clearly mistaken in supposing the supersviors of election appointed in this state, under the act of Congress approved June 10, 1872 (17 U. S. Stats. pp. 348–9), have any authority to supervise or report upon the election of state officers. No return or report they might make in reference to the election of any state officer could have any official sanction, or be received as evidence in this or any other court.

The court having no jurisdicton of the case made by the bill to determine in any form of action the right of complainant to the office in dispute, it is needless to inquire whether a bill in chancery will lie in such case, or whether the remedy must be by *quo warranto.* And for the same reason it is unnecessary to inquire whether the court, supposing it to have jurisdiction, could grant the several injunctions and restraining orders prayed for in the bill.

The complainant must, therefore, be remitted to the justice of his own state tribunals, where, from the foundation of the government down to the present time, the exclusive jurisdiction over cases of contested election for state offices has been vested and still remains, except where the case

turns solely on the single fact specified in the twenty-third section.

The demurrer to the bill is well taken, and the injunctions and other extraordinary writs and relief prayed for are refused, with leave to complainant to have a re-argument upon the demurrer, before a full bench at the next term.

DEMURRER SUSTAINED.

NOTE.—No desire was expressed at the term to have the questions decided in the foregoing opinion heard before the full bench.

Enjoining the governor of a state in the federal courts: *Murdock* v. *Woodson, ante.* Indictment of governor: *United States* v. *Clayton, ante.*

Enforcement Act: Mode of Administration.—As part of the judicial history of the circuit, it may be of interest to the profession to be apprised of the manner in which the anomalous and delicate duties required of the judges of the federal courts by the act of Congress, entitled "An act to amend an act approved May 31, 1870, entitled 'An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes,'" approved February 28, 1871, and the first section of the act approved June 10, 1872, amendatory thereof, have been performed. This will appear by the following statement: —

In July, 1872, various applications from the state of Arkansas having been made to the circuit judge, in conformity with the act of Congress providing for the appointment and defining the duties of "supervisors of elections," in which applications the petitioners stated their desire to have the registration and succeeding election guarded and scrutinized (the said election being one at which representatives in Congress were to be voted for), the circuit judge, under the amendatory act, approved June 10, 1872, made and transmitted to the clerk of the circuit court for the eastern district of Arkansas, the following designation and appointment: —

UNITED STATES OF AMERICA, } ss.
Eighth Judicial Circuit, }

Being unable, by reason of distance, and from other causes, to perform and discharge the duties within the sate of Arkansas imposed by "An act to enforce the rights of the citizens of the United States to vote in the several states of this Union, and for other purposes," and acts to amend the same, I do hereby select and appoint in my place and stead to act for and within the said state of Arkansas, the Hon. Henry C. Caldwell and the Hon. William Story, who are respectively the judges

of the district courts of the United States for the eastern and western districts of Arkansas; and if one of the said judges shall be absent from the state, or unable to act, then the appointment shall be to the other solely and severally, and I do hereby direct and assign to them, or to either of them, as aforesaid, within and for the state of Arkansas, the performance of all duties and acts, and the exercise of all powers, functions, and jurisdiction, by the aforesaid acts of Congress imposed and conferred upon me. Given under my hand, at chambers, in the city of Davenport, this, the 6th day of August, A. D. 1872.

JOHN F. DILLON,
Circuit Judge, Eighth Judicial Circuit.

On the tenth day of August, 1872, court was opened at Little Rock, and the foregoing appointment entered of record, and the said judges notified thereof. An order was made of record that the court remain open from day to day for the performance of the duties imposed and the exercise of the powers conferred by the said acts of Congress.

On the thirteenth day of August, 1872, the following letter was addressed to the chairmen of the republican and democratic state central committees, respectively, both of whom,—among many others,—had asked the benefit of the said acts of Congress:—

LITTLE ROCK, Ark., August 13, 1872.

SIR:—I am directed by the judges to advise you that in pursuance of the act of Congress and the order and appointment of the circuit judge, the circuit court of the United States is now open in this city, and will remain open for the purpose of appointing supervisors of election for the various election precincts of this state, under the act of Congress providing for the same. When this jurisdiction is invoked by proper petitions, the act provides for the appointment of two supervisors of election for each precinct, who can read and write the English language, and who are of different politics, and qualified voters of the precinct. I am also directed by the judges to say, that owing to their limited personal knowledge of men and their politics, in the various parts of the state, they will be unable to select, upon their own knowledge, proper persons, having the required qualifications to act as such supervisors. In view of this fact, and inasmuch as the act of Congress provides that the supervisors of each precinct shall be opposed in politics, the judges have determined to devolve on the democratic and republican state central committees, respectively, the responsibility of recommending one of the supervisors for each precinct. The persons so recommended by your committee will be appointed by the court, unless it be shown that they do not possess the qualifications required by the act, or are otherwise

unfit for the position, and in such case your committee will be notified and requested to recommend some other suitable person. This practice will insure each party a representative of its choice upon the board. The court trusts that your committee will recommend men for the appointment of supervisors whose standing and character will be a guarantee that they will honestly discharge the duties imposed on them by the act of Congress. Very respectfully,

RALPH L. GOODRICH,
Deputy Clerk U. S. Circuit Court.

Recommendations were made accordingly, and the persons recommended were appointed unless known or shown to be unfit for the duty, and persons in each election district or voting precinct thus appointed received a commission, under the seal of the circuit court, by which "they and each of them were authorized and empowered jointly and severally, to exercise and discharge all and singular the rights, powers, and duties, conferred on 'supervisors of election' by the first section of the act of Congress aforesaid, approved June 10, 1872."

It may, perhaps, properly be added that no complaints reached the court or its judges, of the course adopted, but on the contrary they had many evidences that their action was universally satisfactory to the citizens of the state.

McDONALD *v.* WOODRUFF & BLOCKER.

1. In an action for libel against the publishers of a newspaper, it is no *justification* that the article was *copied* from another paper, and that it showed this fact on its face.
2. Under the common law system of pleading, this fact may, when available, be used in mitigation of damages under the *general issue.*
3. One proprietor of a newspaper is responsible for the act of his co-proprietor in publishing a libelous article. [Note.]
4. Libel defined — respective functions of court and jury in the trial of actions for libel — criticism of official conduct and public officers, extent and limitations upon the right — subsequent libelous articles — measure of damages. [Note.]

(*Before* DILLON and CALDWELL, JJ.)

Libel.—Pleadings.—Responsibility of Newspaper Publishers.— Measure of Damages.

PER CURIAM.— In an action against the defendant as the publisher of a newspaper, for the publication of an article, libelous in its nature, concerning the plaintiff, a plea setting up that the article in question was first published in another designated newspaper, and that it was simply copied into the defendant's paper as an item of news, and that the article as copied showed that it was thus copied or taken from the other newspaper, is demurrable; these facts are available under the common law system of pleading, which prevails in this court, in mitigation of damages under the general issue, but in themselves are not pleadable in bar. Such is the weight of authority, and this view seems to us better supported by reason and principle than the opposite one. (2 Greenl. Ev. sec. 424, and cases cited; *Romayne* v. *Duane*, 3 Wash. C. C. R. 246.)

W. G. Whipple, for the plaintiff.

Garland & Nash, *English*, *Gantt & English*, and *Watkins & Rose*, for the defendants.

NOTE.—The cause was subsequently tried before DILLON and CALDWELL, JJ. and a jury. The plaintiff was the supervisor of internal revenue for the district embracing Missouri, Arkansas, and the Indian Territory. His official conduct in proceedings against tobacco manufacturers in the Indian country (see 1 Dillon, 264; *The Cherokee Tobacco*, 11 Wall. 616) called forth an article stated to have been written by Col. Boudinot, reflecting severely upon the plaintiff. This article, first appearing in another newspaper published in or near the Indian country, was copied by the defendants into the *Daily Arkansas Gazette*, of which they were the proprietors. The article was of considerable length, but in it were expressions referring to the plaintiff as "a self-convicted liar," "a stupid ass," "he is in the pay of the St. Louis tobacco manufacturers." No plea of justification was filed, and on the trial no evidence was offered to show any fraudulent or corrupt official conduct on the part of the plaintiff. The evidence being in, and the argu-

ment concluded, the circuit judge, with the concurrence of the district judge, charged the jury as follows: —

DILLON, *Circuit Judge.*—1. This is an action of libel. The declaration contains two counts. The one charges the alleged libelous article was published by the defendants of the plaintiff as a private citizen. The other charges that the same libel was published of the plaintiff in his public capacity as supervisor of internal revenue. The defendants plead not guilty. This makes it incumbent on the plaintiff to prove the publication as alleged by the defendants of the article or words alleged to be libelous; the fact that the article or words referred to the plaintiff; his official character, so far as damages are asked, in respect to his official character, and the defendants' alleged malicious intention in the publication of the article or publication complained of as libelous. If the defendants were the proprietors of the newspaper named in the declaration, called the *Daily Arkansas Gazette*, and if the article containing the words alleged in the declaration was published therein while the defendants were such proprietors, the allegation of the publication is established, and one of the proprietors of a paper is liable for what is done by the others in publishing libelous articles upon individuals.

2. If you find the fact of the publication by the defendants proved to your satisfaction by the evidence, you will next consider whether the article published related to the plaintiff, and is libelous in its character. At the present day the law in relation to libel is "That the judge is not bound to state to the jury, as a matter of law, whether the publication complained of, and sued for, is a libel or not; but the proper course is for him to define what is a libel in point of law, and leave it to the jury whether the publication falls within that definition, and as incidental to that, whether it is calculated to injure the reputation of the plaintiff." (2 Greenl. Ev. sec. 411.)

Accordingly, it becomes the duty of the court to define what is, in law, a libel.

This we do in the language of the supreme court of the United States: "Every publication in print, which charges upon or imputes to any person that which renders him liable to punishment, or is calculated to make him infamous, odious, or ridiculous, is a libel, and implies malice in the author or publisher: Proof of malice in such publications is not required of the plaintiff; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant." (3 How. 291.)

It is your duty to determine whether the publication sued for in this action falls within this definition. The plaintiff selects certain parts of the article, and charges it to be libelous. In determining whether the publication was or was not libelous, as above defined, you are to consider the whole publication — take it by the four corners and consider it

in all its parts, in order to determine the meaning and purpose, character and effect of the particular words complained of.

3. Malice is essential to make a publication a libel; but in law, every publication which falls within the definition of libel above given, is, in law, presumptively malicious. Malice has, in law, a meaning not exactly the same in all respects with its common signification. Malice, in its common acceptation, means ill-will against a person; but in its legal sense, means a wrongful act done intentionally, or without just cause or excuse. Malice, in law, is not the same thing as malice in fact. Malice, in law, is implied from wrongful and unjustifiable acts, done on purpose or without just or legal excuse.

4. There is a wide difference between publications relating to public and private individuals. Every person and every newspaper may fairly criticise the action or official conduct of public men or public officers; so far there is no liability; but neither a person nor newspaper can make such comments or criticism a vehicle for malice or the indulgence of private spite; nor impute to public men or officers such conduct as disgraces or dishonors them; or make charges against them which have this effect, unless they are able to justify or prove them to be true, and made in good faith and for good ends.

5. If you find that the publication alleged in the declaration was made by the defendants as therein alleged, and that it was libelous in its character, as a libel is before defined, you will have occasion to consider the question of damages; and in its consideration your attention should be directed to all the circumstances of the case. Malice is essential to the action; but malice, as above explained, is of two kinds—legal or implied malice, and actual malice: that is, personal spite or ill-will. The amount of damages (if the plaintiff, in an action for libel, is entitled to recover) depends, where no special damage is shown (and evidence of no special damage has been produced in this case), upon the degree or intensity of the malice, legal or actual. You can derive no aid in assessing damages from the results of other cases, for it is quite impossible, in the nature of things, that any two actions for libel should be exactly alike.

The circumstances and the distinctive character of the case before you are to be considered. It must be evident to you, that if the defendants are liable at all, the amount of their liability is, or may be, very different from what it would have been if they had written the article instead of having copied it (as it is conceded they did) from another journal. Not that a newspaper, even in the way of news, can copy without liability an article that is libelous in its nature upon an individual or public officer, for this cannot be done. So, if an article, libelous

in its character, is copied from another paper, there is a liability therefor, but such liability would be greater if it was published by the defendants from actual ill-will or actual malice toward the plaintiff, than if no such ill-will or actual malice existed. Whether there was any actual malice or ill-will is a question of fact for you to decide from all the evidence and all the circumstances before you. Publishing a copied article, if libelous in its character, is not justifiable, but the fact that it is copied may be considered in mitigation of damages. If you find from all the circumstances that there was no malice on the part of the defendants towards the plaintiff, inducing or actuating the publication complained of, then you can give no damages on account of such malice; but if the publication was made, and is libelous, the law presumes malice, and the action cannot be defeated, and the legal malice thus presumed cannot be rebutted by evidence which negatives the existence of any malice in fact.

The court repeats: The amount of damages depends essentially upon the degree of malice, express or implied, but want of actual malice is no defence to an action for the publication of an article which is, in law, a libel. As the amount of damage depends upon the degree or intensity of the malice, you must consider what were the motives which actuated the defendants, or either of them, in the publication of the article and the circumstances under which the publication was made. To throw light upon this, the plaintiff has introduced certain other articles subsequently published by the defendants in their paper concerning him. You must understand that you can give no damages in this action on account of those subsequent publications. You can only consider them in connection with the inquiry as to the motives with which the publication sued for was made, and to show malice, or the degree thereof *existing at the time* the original article was published.

With these general rules to guide juries in assessing damages, the law leaves the amount to their sound judgment, reasonably, fairly, and dispassionately exercised. This is does from necessity. If one man owes another so many dollars, or has taken from him so much property, or has broken a specific contract, there is something to *measure* (as the law expresses it) *the amount of the damages or the recovery.* But in an action of this kind the law is unable to furnish you with any definite rule to measure the damages. It confides it to the sound, temperate, deliberate, and reasonable exercise of your functions as jurymen. The law leaves the jury at liberty to find and return such damages as they think right and just, but this is not a wild, unrestrained, communal liberty, to be arbitrarily exercised, but the higher and better kind of liberty, viz: Liberty restrained by reason and moderated by justice.

The jury returned the following verdict: "We, the jury, find for the plaintiff, and assess the damage at *one dollar.*"

[As subsequent libels constitute distinct and substantive causes of actions, proof thereof cannot be admitted to affect the damages, but only as bearing on the question of malice: *Beardsley* v. *Bridgman*, 17 Iowa, 290, 1864.]

WHITWELL *v.* PULASKI COUNTY.

1. Where the statute of the state provided that the county court (the body having the management of county affairs) shall issue *ordinary county warrants* of a prescribed form for all sums of money found due from the county, it was held that the county court had no *implied* authority to fund outstanding warrants by the issue of negotiable bonds payable at a fixed future time, and which, if valid, would change and enlarge the liability of the county.
2. Such bonds under the legislation of the state are *ultra vires*, and impose no liability upon the county even when in the hands of a holder for value.

(*Before* DILLON and CALDWELL, JJ.)

County Warrants.—Negotiable Bonds.—Power to Fund Debt.

THIS is an action by the plaintiff, a non-resident holder of about $75,000 of the bonds of the county of Pulaski. Each of the bonds, except as to date, amount, and name of payee, is of the tenor following: —

STATE OF ARKANSAS.

PULASKI COUNTY FUNDED DEBT.

Five Hundred Dollars.

No. 16.] [$500.

One year after date the county of Pulaski will pay five hundred dollars to M. K. Starke, or bearer, with interest at the rate of eight per centum per annum.

This bond is issued in payment of the outstanding scrip of said county under an order of the county court of July term, A. D. 1871, and is receivable in payment of the funded debt tax of 1871.

Given at Little Rock, Arkansas, this 15th day of August, 1871,

[L. S.] In witness whereof the seal of the county court and the signatures of the presiding judge and clerk are hereto affixed.

D. REEVE, *Presiding Judge.*

G. W. McDEARMID, *Clerk.*

No question is made upon the form of the complaint which refers to and makes the bonds in suit part thereof. By demurrer to the complaint the county raised the question of the authority of its officers to issue the bonds. It was conceded by counsel that there was no express statute, general or special, authorizing the issue, and the right was claimed by implication.

Benjamin & Barnes, and *T. D. W. Yonley*, for the plaintiff.

A. H. Garland, and *Gallagher & Newton*, for the county.

DILLON, *Circuit Judge.*—The demurrer to the answer presents the question whether the county of Pulaski had authority to issue the bonds in suit.

The county affairs in this state are under the management and control of the county courts, whose jurisdiction and powers are prescribed by statute. Among other powers, these courts are authorized "to audit, settle, and direct the payment of all demands against the county," and they have jurisdiction "in all matters relating to county taxes, disbursement of money for county purposes, and in any other case that it may be necessary for the internal improvement and local concerns of the county." (Gould's Dig. p. 317, sec. 7.)

By statute it is also provided that "Where any county court shall ascertain that any sum of money is due from the

county to any person, an order shall be made allowing the same and directing the clerk to issue a warrant therefor, which shall be of the following form." The form prescribed consists of a direction to the treasurer to pay to ———, or bearer, ——— dollars, ———, naming the particular fund, if any, and signed by the clerk.

The question as to the *implied* authority of counties generally to issue negotiable paper does not arise in this case, for here the statute contains a specific direction that when money is due from the county it shall be evidenced by ordinary county warrants. This excludes any implied authority, which might otherwise be contended to exist, to issue negotiable bonds or paper. The bonds in suit recite on their face that they are issued in payment of the outstanding scrip of the county, and are receivable in payment of the funded debt of 1871, and draw interest at the rate of eight per cent per annum.

Negotiable bonds, payable at a fixed future date, and meanwhile drawing interest at a rate exceeding the rate which in any event an ordinary warrant can draw, and payable out of a specific tax fund not applicable to the payment of ordinary warrants, are, in form, and substance, and effect, different from the warrants which counties are authorized to issue.

It is conceded by the counsel for the plaintiff that there is no express authority in any statute for the order of the county court made at the July term, 1871, for the funding of the outstanding scrip of the county, and under which the bonds in suit were issued. If these bonds did not change and enlarge the liability of the county, it might be argued that they should be treated as the substantial equivalents of warrants. But if valid, they do change and enlarge the liability of the county. They draw interest at a greater rate than warrants, and this for a fixed future period. If bonds payable in one year are valid, so likewise would be

bonds payable in twenty or fifty years. Other provisions of this statute limit the amount of taxes which may annually be levied by the county authorities for the payment of its ordinary liabilities, including outstanding warrants. (See *Kinsey* v. *Pulaski County*, *post.*) But there is no such limit upon the amount of taxes which may be levied for the payment of the authorized funded debts of the county.

It is precisely because there is a substantial difference between these bonds, assuming their validity, and the usual county warrant, that we may suppose that creditors were willing to surrender their warrants and take the bonds. The action of the county officers in issuing the bonds is *ultra vires*, and imposes no liability upon the county.

We need not now state what remedies the holders of these bonds may have, but undoubtedly they may compel the county to re-deliver the warrants surrendered, if not canceled, or new warrants in their place.

CALDWELL, J., concurs.

DEMURRER SUSTAINED.

NOTE.—Nature of county warrants, and distinction between them and negotiable bonds; and as to implied authority to issue negotiable paper, see the cases cited in Dillon's Munic. Corp. secs. 406, 407.

Statutory power to issue county orders held to confer no power to issue negotiable bonds payable at a future day, where the difference is essential: *Goodenow* v. *Commissioners*, 11 Minn. 31, 1865; *County Commissioners* v. *Carter*, 2 Kansas, 115; *Hull* v. *County*, 12 Iowa, 142. The same principle is declared by the supreme court of the United States in the recent case of *Britton* v. *Police Jury*, 15 Wall. 566, where the *implied* authority of a county to issue negotiable paper to raise money, or to fund outstanding indebtedness, was denied.

KINSEY *v.* PULASKI COUNTY.

Power in the county authorities to erect bridges and to support the poor therein conferred by general enactment, was held not limited by provisions in the revenue law of the state restricting the rate of taxation which may be annually levied by these authorities for bridge purposes and the maintenance of paupers.

(*Before* DILLON and CALDWELL, JJ.)

County Warrants.—Power to Issue.

THIS is an action by the plaintiff as a holder of a large number of *county warrants* issued in the form specified by the statute. Gould's Dig. p. 923, sec. 46. They express on their face to be payable out of any moneys appropriated for the several purposes named in the warrants as "for medical attendance at the county jail;" for building Fourche bridge;" "wood for county poor house;" "county clerk's fees," etc.,

The third count of the answer is as follows:

III. "The said supposed warrants or orders amount in the aggregate to the sum of twenty-four thousand one hundred and eighteen dollars ($24,118.00), and as appears from the face of the same, all of said warrants or orders, except the amount of three thousand two hundred dollars ($3,200), were issued in payment of a tax levied, or attempted to be levied, by the county court of Pulaski county, for the year A. D. 1871, to build bridges, and to care for the poor, or paupers, in said county, and the amount so levied for the *pauper fund* for the year 1871, was $29,080.64, and the amount levied for the same year on account of *bridge fund* was $63,159.76, as will appear by reference to the certificate of the clerk of said county court, herewith filed and marked *XI.*, and a part hereof; and the value of the taxable property in said county for the same year, was nine millions five hundred and thirty-nine thousand four hundred and forty-four dollars ($9,539,444), and upon this amount, for

both purposes, there should not have been levied any tax greater than $19,078, when there was levied for both purposes $92,240.40, making a tax in excess of the legal amount of $73,162.40; for defendant says, under the *revenue law* of the state of Arkansas, in force when such assessment and levy were made, no greater tax could be assessed by the county court, than one mill on the dollar of the taxable property of the county for *bridge purposes*, and a like amount for taking care of the poor or paupers of the county, and to pay the tax so assessed and levied contrary to law as aforesaid, all of said supposed warrants or orders except to the amount of $3,200, as hereinbefore stated, were issued, and said assessment and levy being illegal and void, so are said supposed warrants or orders issued to pay the taxes required by such assessment and levy; and defendant further shows, that besides the said supposed warrants or orders, sued on herein, other warrants or orders of like character have been issued, which, added to those sued on, make up the full amount of the illegal assessment of $92,240.40, as aforesaid, as appears by the certificate of the clerk of said county court hereto appended and marked *XI*."

To this count the plaintiff demurred on the ground that it sets forth no defense to the action, and this is the question presented for determination.

Benjamin & Barnes, *T. D. W. Yonley*, for the plaintiff.

A. H. Garland, *Gallagher & Newton*, for the county.

Dillon, *Circuit Judge.*— The county court of each county in Arkansas is invested, *inter alia*, with jurisdiction and power to order the erection and repair of bridges, and is charged with the duty of taking care of and maintaining the poor therein.

There is no express and specific limitation in the statutes

as to the amount of liability which the county may incur for these purposes.

The defense set up is, that there is such a limitation, and that the most of the warrants in suit were issued after this limitation had been passed, and hence are not binding upon the county. The limitation is sought to be deduced from the provisions of the *revenue law* of the state, by which it is provided, that no greater tax can be assessed and levied by the county court than one mill on the dollar of the taxable property of the county for bridge purposes, and a like rate for taking care of the *poor* of the county.

The power to incur a liability in respect to bridges and paupers is distinct from the power to levy taxes to meet liabilities thus incurred.

It may, or may not be, that no greater rate of taxation can be levied than the limited rate above mentioned, but this is a different question from the one, whether the county court in making contracts or incurring liabilities for bridges and paupers is limited to such as may be met out of such funds as may be raised by taxation at the specified rates.

It is our opinion that the limitation in the revenue laws as to the rate or amount of taxes which may be annually levied for bridges and paupers, does not measure the legal power of the county court to bind the county by contracts otherwise binding for these purposes.

CALDWELL, J., concurs.

DEMURRER OVERRULED.

NOTE.—As to limitation on rate of taxation where there is express or special authority to create a debt: See *Britton* v. *Platte City*, *ante*, 1; Dillon, Munic. Corp. secs. 107, 610, and cases cited. *Whitwell* v. *Pulaski County*, *ante*, p. 249.

WALKER *v.* MOORE.

Under the statutes of Arkansas a *tax deed* which shows by its recitals that *two or more* separate town lots were *sold en masse*, for a gross sum, is void on its face, and cannot be contradicted by evidence *aliunde*.

(*Before* DILLON and CALDWELL, JJ.)

Tax Deeds.—Sale of Separate Lots En Masse.

EJECTMENT for lots 1, 2, and 3, in block 2, Little Rock. The defendants are the general owners of the property. The plaintiff claims under the tax deed hereinafter mentioned, made to him by the county clerk under authority conferred upon this officer by the laws of the state. (Acts 1869, sec. 144.)

By the recitals of said tax deed to the plaintiff, it appeared that lot 4, in block 1, and lots 1, 2, and 3, in block 2, in Little Rock, were assessed for taxation upon the non-resident list for 1867, to Bliss & Schenck, and that the same were advertised for said taxes for sale on the 9th day of March, 1868. Before the day fixed for the sale, but after the advertisement, the deed recites, that the owners had paid the taxes and obtained an injunction against the collection of the penalty, but did not pay the costs of advertising. The tax deed recites that on said day fixed for the sale, the sheriff, as collector, "did proceed to sell at public auction the said lots of land in separate lots and parcels, for the non-payment of such costs of advertising, which amounted to the sum of $3.60, and at such sale Thomas H. Walker bid and offered to pay the said costs for the whole of said lots, and no person having bid or offered to pay such costs for a less quantity thereof, the same were then and there publicly struck off and sold to him for that sum." In consideration of said $3.60 the sheriff grants the said lots to the said Walker. The sheriff's certificate of sale shows that the costs charged for advertising lot 4 in block 1 were $1.80,

made up of the following items: Advertising, 80 cents; clerk, 25 cents; levy and return, 75 cents; total, $1.80. And the like amount of $1.80 for lots 1, 2, and 3, in block 2.

The tax deed and sheriff's certificate of sale were offered in evidence by the plaintiff to sustain title; the defendant objected to their introduction, because the deed was void on its face.

Gallagher & Newton, for the plaintiff.

U. M. Rose, for the defendant.

DILLON, *Circuit Judge*.—The revenue statute of Arkansas requires the collector, on the day fixed for the sale of lands for delinquent taxes, to "proceed to offer for sale, *separately, each tract of land and town lot* contained in such list, on which the taxes and penalty have not been paid." (Gould's Dig. 950, 118.) "The person offering at such sale to pay the taxes charged on any tract or lot, for the least quantity thereof, shall be the purchaser of such quantity." (*Ib.* sec. 119.) "Such tracts or lots as shall remain unsold for want of bidders shall be entered as sold to the state." (*Ib.* sec. 123.)

Construing the recitals in the tax deed the most favorably for the plaintiff, they show that the several lots were *offered* in separate parcels, but sold *en masse*, for the gross sum of $3.60.

Under the statute each lot must be offered for sale separately, and if there be no bidders, the lot must be entered as sold to the state. There is no authority in the statute, after distinct lots have been separately exposed, and no bidders have been found, to group these lots, though belonging to the same owner, and sell them *en masse*. If this be done, the sale is void; and a deed showing, as in the deed to the plaintiff, that this course was pursued, is void on its face.

A deed void on its face for this reason cannot be vali-

dated by parol evidence contradicting the recitals in the deed.

We therefore hold that the tax deed offered by the plaintiff must be excluded. We also hold that the offer of the plaintiff to show by evidence, *aliunde* the deed, that there was a separate sale of lot 4 in block 1 is incompetent.

We also hold that the offer of the plaintiff to show by evidence, *aliunde*, that all of the requirements of the tax law of the state had been complied with, unless said requirements were violated by the sale of the lots together, must be rejected, for the reason that the deed recites a sale of said lots *en masse*, and is therefore void on its face, and hence it is immaterial whether the other requirements of the revenue law were complied with or not.

JUDGMENT FOR DEFENDANT.

NOTE.—Where the statute requires a sale in parcels, a tax deed showing a sale of several parcels, *en masse*, is void: *Ryan* v. *Cook*, 21 Iowa, 393; *Ferguson* v. *Heath*, *ib.* 438; *Harper* v. *Sexton*, 22 Iowa, 442; *Ashley* v. *Sexton*, 24 Iowa, 320. See, also, *Loomis* v. *Pingree*, 43 Maine, 299.

As to assessment of several parcels as one tract, where so returned by the owner: *Woodburn* v. *Wiseman*, 27 Pa. St. 18.

As to recitals in tax deeds and their effect under the laws of Arkansas: *Bonnell* v. *Roane*, 20 Ark. 125; *Hogan* v. *Brashears*, 13 Ark. 242, 249; *Bettison* v. *Budd*, 21 Ark. 581; *Patrick* v. *Davis*, 15 Ark. 365; *Twomley* v. *Kembrough*, 24 Ark. 464; *McDermott* v. *Scully*, M. S. Sup. Court, Ark. Deer T. 1871; *Packer* v. *Overman*, 18 How. (U. S.) 137.

REPORTS

OF

CASES DETERMINED

IN THE

Circuit Court of the United States,

FOR THE

DISTRICT OF NEBRASKA.

FORT *v.* UNION PACIFIC RAILROAD COMPANY.

1. A railroad company is liable for the negligent act of a foreman having charge of dangerous machinery, who, in the course and within the scope of his duties, orders an infant employe under him upon a service hazardous to life or limb, and which was not within the scope of the ordinary or proper duties of the servant thus commanded to perform it; in such a case the rule which exempts the employe from liability to one servant for the negligence of a fellow-servant in the same common service, has no just application.

2. Damages down to and even beyond the day of trial may, in proper cases, be given.

(*Before* DILLON and DUNDY, JJ.)

Negligence.—Liability of Master to Servant for Acts of Fellow-Servant.—Damages.

ACTION by the plaintiff for an injury to his minor son when in the employment of the defendant. The allegations

of the petition in respect to the manner in which the injury was caused are as follows: —

"Plaintiff further says that on or about October 1st, A. D. 1867, plaintiff's minor son, James H. Fort, then aged about sixteen years, was hired and employed by defendant to work in defendant's machine shop in the city of Omaha; that a portion of said shop and the machinery therein was under the superintendence and control of one Collett, agent and servant of said defendant; that said Collett, being grossly negligent and careless in so doing, did order and direct (being thereto duly authorized by defendant, and said minor as such employé being under him as such superintendent) said minor to ascend to a great height, to-wit — twenty feet from the floor of said shop, and among rapidly revolving and dangerous machinery, for the purpose of adjusting a certain belt by which a portion of said machinery was moved; that said undertaking was a hazardons one even for an adult to perform; that said minor undertook to perform said order, but in attempting so to do was caught by the right arm by said belt, said belt being caught by a certain key which was improperly projecting from the shafting near which he was so directed to go, and said arm torn from his body; that said minor was guilty of no negligence or carelessness in attempting to discharge said order, but that he was compelled to obey all orders and directions of said Collett pertaining to his said employment."

The answer puts in issue the substance of these allegations in regard to negligence.

After the evidence was produced, the jury were charged as follows by the circuit judge: —

"1. This action is brought by plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm while in the employ of the defendant.

"That the plaintiff's son was employed by the defendant,

and by an accident his arm was torn off by machinery in the car shop of the defendant, are facts which are admitted. Evidence has been offered tending to show that the defendant, in its works at this city (Omaha) had a car department, of which Mr. Gamble was the superintendent; that under him, and having immediate control of the shop, was a foreman, Mr. Ballou; that under the foreman there were various sets, or, as a witness called them, "gangs," of men, under the immediate direction and control of some employé or "boss;" that, among those having control of a set or gang of men working in the shop was a Mr. Collett (named in the petition); that Collett's duty was to run and superintend the running of a certain machine, or certain machinery, in the shop; that, from the time the plaintiff's son was employed he had been working under Collett, obeying his orders and directions; that the chief employment of the son had been at a moulding machine, receiving and putting away mouldings as they came from the machine. After the son had been thus engaged for some months, the evidence tends to show that, on the day the accident in question happened, a belt or band connected with a shaft, some fourteen or sixteen feet high, was off the drum, or pulley, and needed lacing. It does not very clearly appear, perhaps, whether the belt thus out of order belonged to the moulding machine or some other machine near by; but there is evidence tending to show that it was within the scope of Collett's duty to see that it was repaired. The plaintiff has given evidence, which has not on this point been opposed by any evidence produced by the defendant, that at the time of the accident, Collett, wishing to lace the band at the end near the floor, ordered the plaintiff's son, about sixteen years of age, to ascend a ladder resting on the shaft at the upper end, which shaft was in motion at the rate of one hundred and seventy-five or two hundred revolutions per minute, and hold or keep the band or belt away from the shaft, while he (Collett)

laced or sewed it together at or near the floor; and the right arm of plaintiff's son, while thus engaged, pursuant to the orders of Collett, was caught, or in some way became entangled, in the belt, or drawn between it and the shaft, and was instantly crushed to pieces and torn from his body.

"The plaintiff has offere devidence tending to show that he hired his son to the defendant to work in the car shop, making the contract with Mr. Gamble, the superintendent; that at the time Mr. Gamble went with the son into the shop, and directed him, in Mr. Collett's presence, to help Collett, or work under him, and obey his orders. Upon the evidence, I do not understand it to be claimed by the plaintiff that the accident was caused by the defect in the key (the only defect alleged in the pleadings as to the machinery), and on the trial no question has been made as to Collett's general skill, fitness, and capacity for the performance of the functions or duties assigned to him; and the specific ground on which the recovery is claimed is that Collett, in ordering the plaintiff's son to ascend the ladder and perform the service before mentioned, considering the age of the boy and the nature of the service required of him (which is claimed by the plaintiff to have been dangerous to life and limb), was guilty of a wrongful or negligent act, which resulted in the injury for which this action is brought.

"2. There is no statute in the state of Nebraska relating to the liability of masters to servants, and the rules regulating such liability must be found in the general principles of the law as declared by the courts.

"One of these principles, too often decided by all the English, and most of the American, courts, to be now denied, is, that a master is not liable to his servant or employe for the negligence of a fellow-servant while engaged in the same common employment or service, unless he has been negligent in the selection of the servant in fault, which is an element, as before observed, not in this case. And this

doctrine has been extended by the English, and by many of the state courts in this country, to all persons serving the same master in the same employment, whether equal, inferior, or superior in grade, to the servant injured, and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused, has been considered to make no difference in the application of the rule. Although the rule, particularly this extension of it, so as to exempt a master for the negligence of a servant within the scope of his employment, who has the control of another servant, for an injury to the latter, caused by his obeying the orders of his superior, has met with much, and perhaps, just and reasonable opposition; yet, it has been so often and so generally decided, that it is doubtful how far a court, whatever may be its own convictions, is at liberty to disregard it. But I do feel free to refuse to extend the rule to cases to which the reason on which it rests does not apply. The reason of the doctrine is, that a servant or employe, in making his contract, must be presumed to take into account all the ordinary risks of the business on which he proposes to enter, and obtains a compensation which, upon the average, covers these risks, amongst which are included negligence of fellow-servants in the same common employment, but he is not presumed to take into account a risk not included in his employment, and which, therefore, he has no reason to anticipate.

"In deciding this case, you should determine the nature of the employment on which the plaintiff engaged that his son should serve. If you find that his contract of service, or the duties which he engaged to perform were such that it was within the contract, or within the scope of those duties, that the son should assist in the repair of the machinery in question, and that the son, when injured, was in the discharge of a duty or service covered by the contract of employment, then the company is not liable for the negligence of Collett

(if he was negligent), with respect to ordering the son to ascend the ladder and hold the belt away from the shaft.

"But I draw this distinction: If the work which the son was ordered by Collett to do was not within the contract of service,—was not one of the duties which fell within the contract of employment, but was outside of it, then Collett, in ordering the service in question (if he was in scope and course of his duties and power at the time), must, as to this act, be taken to represent the company (which is presumed to be constructively present), and if that act was wrongful and negligent, as hereinafter defined, the company, his employer, would be liable for the damages caused by such negligent and wrongful act; and the principle before adverted to, that the master is not liable for the neglect of a co-employe in the same service has, in my judgment, no application, or no just application, to such a case; for in such a case they are not, in any proper sense, 'fellow-servants' in the same common service.

"3. This action is based essentially upon the alleged negligence of Collett, and the negligence imputed consists in the nature of the order which he gave the plaintiff's son. If, under the foregoing instructions, you find that the company is liable in respect of the act of Collett in ordering the boy up the shaft, you will then have to inquire whether that act was wrongful and negligent.

"Now, gentlemen, that depends upon the circumstances of the case, which you should attentively consider.

"An employer is not an insurer of the lives and limbs of his men, but he does impliedly engage that he will not expose them to unnecessary, unusual, and unreasonable risks to life, or serious bodily injury. Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, under all the

circumstances surrounding and characterizing the particular case; and in this case it is the duty of the jury to consider the age, and experience, and extent of judgment of the boy, and the nature of the service demanded of him, in respect to its being hazardous to life or limb, or otherwise.

"If a reasonable and ordinarily prudent man would not have ordered a boy of his age, under the circumstances, upon such a service, because it was dangerous, then it was a negligent and wrongful act; but if it could not, by a man of reasonable prudence and sagacity, have been foreseen that the service demanded was perilous to the life or limb of the boy, the company is not liable, although the act required of the boy was one not falling within the scope of his employment.

"4. This is an action by the father for loss of service of the son, and under the pleadings he can only recover pecuniary damages, which includes actual or necessary expenditures for supplies for the son during his recovery, the value of his and his family's necessary attention to the son, and the value of the loss of the services of the son from the date of the accident down to the time of trial."

The jury returned a general verdict for the plaintiff in the sum of $2,264.92, if the damages be computed only to the date when suit was brought, March 10, 1870, but in the sum of $3,056.58, if damages be computed to the time of trial, November 10, 1871.

The jury also made the following *special finding* in regard to the nature of the employment of Collett and of the plaintiff's son, and the cause of the injury, to-wit: —

"We find that the car department of the defendant was under the management of a general superintendent, who employed and dismissed the hands; that the shop, as to practical operations therein conducted, was under a foreman; that the employes were divided, according to their

work, into sets, with an under or immediate foreman; that one of these under-foremen was Mr. Collett, named in the petition, under whom plaintiff's son was to and did serve, as a workman or helper, and whose orders he was to and did obey; that Collett had charge of running and superintending certain machinery in the shop. We find that the plaintiff's son was injured in executing or carrying out an order of Collett, as described in the petition; that this order related to a matter within the scope of Collett's duty and employment. We find that the order to the plaintiff's son (in carrying out which he lost his arm) was one which was not within the scope of the son's duty and employment. We find that it was not a reasonable order, and that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it."

A motion was made by the defendant for a new trial, which was denied for the reasons stated in the opinion of the court.

Redick & Briggs, for the plaintiff.

A. J. Poppleton and *E. Wakeley*, for the defendant.

DILLON, *Circuit Judge.*—1. In support of the motion for a new trial, it is urged by the defendant's counsel that the court erred in that portion of the second division, its charge to the jury commencing with, "But I draw this distinction," and ending with the words, "for, in such a case, they are not, in any proper sense, 'fellow servants' in the same common service." I fully appreciate the difficulties that surround the question here presented, and I do not feel certain that this particular case can be discriminated from those in which it is held that the common employer of two servants is not liable to one for the act or negligence of the other in the course of the common employment.

Considering, however, the peculiarities of the case,—the tender age and inexperience of the servant injured, the specially hazardous, extraordinary service which was demanded of him, and that the superior servant, who ordered the boy to perform it, was in the course of his proper duties, and that the injury resulted *directly* from his negligent and wrongful command, I do not think that it justly falls within the principle which disentitles a servant to recover from the master for an injury caused by the negligence of a co-servant in the same common service. At all events, it is my clear and fixed conviction, that, upon reason, principle and public policy, the employer ought to be, in such a case as the present, responsible civilly for the act of the servant whose neglect and wrongful conduct caused the injury. I do not intend to elaborate my views, nor enter upon a discussion of the authorities. I am aware of the great extent to which the general rule has been carried by the courts—particularly by the courts of England. I place my judgment upon this ground: Collett, in superintending the repair of the belt attached to the machinery, was in the discharge of a duty entrusted to him by the corporation, and in the performance of that duty he, and he alone, at that time, represented the corporation, which, in contemplation of law, was there present in his person, and when he ordered, without due and reasonable care and reflection, the boy to perform a service attended with so much danger, and one which involved a risk not within his ordinary duties and employment, the company ought to be held liable for the wrong the same as if, under the like circumstances, the same act had been required of the boy by an individual employer. True, Collett was a servant of the company, but so was Ballou the general foreman of the shop, and so was Gamble the superintendent, and so are all the other officers of the corporation in the long line of gradation from the

president to the lowest. If the company is not responsible for the wrongful act of Collett, it would not be had the same act been done by the foreman of the shop, by the superintendent of the car department, or even by the president of the company himself. Here was dangerous machinery in operation; here was a service, dangerous in its nature, to be performed. Public policy requires that the master, where the safety of a person of tender years and inexperience is concerned, if, indeed, in any case, should not be able to abdicate his duty, or to shift upon another his liability, and this he is enabled effectually to do if he is not liable for the tortious act and neglect of his own servant, and his only representative in connection with the service which was required of the boy. Without denying the general rule, our conclusion is that it should not be extended to this case.

2. On the trial it was contended by the defendant that the jury could in this action only consider and allow for such damages as had happened when the action was brought, while the plaintiff maintained that the jury might take into consideration all the damages that had been sustained up to the day of trial. On this point the court charged as requested by the plaintiff, and there is little doubt that this was a view sufficiently favorable to the defendant. It has been held, indeed, that, in proper cases, damages *prospective* in their nature, but certain to result from the wrongful act, may be considered and allowed, when they do not form the basis of a new action. (*Wilcox* v. *Plummer*, 4 Pet. 172; cases cited, 2 Greenl. Ev., Sec. 268 *a*, Sec. 268 *b*.)

Judgment will be entered upon the verdict for the sum of $8,056.58.

DUNDY, J., concurred.

JUDGMENT ACCORDINGLY.

NOTE.—A bill of exceptions was signed and the case taken to the supreme court, where it is now understood to be pending.

As to *measure* of damages, see *Filer* v. *New York, &c. Co.* 49 N. Y. 42, in

which it was held that successive actions will not lie for the recovery of damages resulting from an injury to the person in consequence of a single wrongful act; but the recovery may include present damages, and such future or prospective damages as it is reasonably certain will necessarily and inevitably result from the injury.

In *Hines* v. *Union Pacific Railroad Co.*, at the May term, 1873, of the same court, before DILLON and DUNDY, JJ., the action was by a *brakeman* against the company; the petition charging that the plaintiff, as brakeman, was engaged in *coupling cars*, and that the engineer in charge of the moving section of the train carelessly backed it with such force and speed as to cause the plaintiff's hand to be crushed, and that the engineer was incompetent, and the defendant knew it. After argument by counsel (Mr. *Redick* for the plaintiff, and Messrs. *Poppleton & Wakeley* for the company) the court directed the jury, in substance, as follows:—

1. That the *engineer and brakeman*, being both at their posts and in the line of their duty at the time, *are fellow-servants*, within the meaning of the rule which exempts the employer from liability to one servant for the fault of another, and that the general rule applied to the case under the pleadings and proof, unless the company was to blame for having an incompetent or improper person as engineer.

2. That no mere negligence on the part of defendant's engineer as to the *rate of speed and force* with which the train was run at the time of the accident will impose any liability on the defendant for the injury to the plaintiff.

3. That *the plaintiff alleges and must show* that the accident was caused by the negligence of the engineer, as charged in the petition, and also that the company was guilty of negligence, or want of reasonable care, in the employment of an incompetent engineer, or in retaining him in its employment after notice of his incompetency, or of facts and circumstances from which it reasonably appears that his incompetency ought to have been discovered, or from which notice thereof may reasonably be inferred.

There was a verdict and judgment for the defendant.

In England the rule is "conclusively settled that one fellow-servant cannot recover [from the master] for injuries sustained in their common employment from the negligence of a fellow-servant, unless such fellow-servant is shown to be either an unfit or improper person to have been employed for the purpose: *Morgan* v. *Vale, &c. Railway Co.* 5 B. & S. 570: in Excheq. Ch. 5 B. & S. 736; Law Rep. 1 Q. B. 149. And this rule is not altered by the fact that the servant to whom the negligence is imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey." *Per* MELLOR, J., in *Feltham* v. *England*,

Law Rep. 2 Q. B. 33, 1866. "A foreman is a servant as much as the other servants whose work he superintends." *Per* WILLES, J., in *Gallagher* v. *Piper*, 111 Eng. C. L. 669, 1864; *Wigmore* v. *Jay*, 5 Weltsby, Hurl. & Gord. 354, 1850; *Skipp* v. *Eastern Counties Railway Co.* 9 *ib.* 221; *Wiggett* v. *Fox*, 11 *ib.* 832; *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. H. L. Cas. 266.

Fellow-servants—who are? See also *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. H. L. Cases, 266; *Waller* v. *South &c. Railway Co.* 2 H. & C. 102; *Gallagher* v. *Piper*, 111 Eng. C. L. 669; *Morgan* v. *Vale &c. Railway Co.* 5 B. & S. 570, 736; *Feltham* v. *England*, Law Rep. 2 Queen B. 33; *Tunney* v. *Midland, &c. Railway Co.* Law Rep. 1 C. P. 291; *Lovegrove* v. *London &c. Railway Co.* 16 C. B. N. S. 69. See *Murphy* v. *Smith*, 19 C. B. N. S. 361, as to servant being considered as the master's representative in the establishment.

All the cases concur in holding that the master is liable for his own personal negligence.

Duty of master to take reasonable precautions for the safety of his servants: *Brydon* v. *Stewart*, 2 Macq. H. L. Cases, 748; *Patterson* v. *Wallace*, 1 Macq. H. L. Cases, 748.

Responsibility for defective or improper machinery, or absence of proper guards: *Jones* v. *Yeager*, *ante*, 64. See, also, *Weems* v. *Mathieson*, 4 Macq. H. L. Cas. 215; *Clarke* v. *Holmes*, 7 Hurl. & Norm. 937; *Tarrant* v. *Webb*, 18 C. B. 797; *Searle* v. *Lindsay*, 11 C. B. N. S 429; *Watling* v. *Oastler*, 6 Law Reporter, Exch. 73; *Roberts* v. *Smith*, 2 H. & N. 213.

Effect of servant's knowledge and voluntary use of the defective machinery, or knowledge of danger: *Jones* v. *Yeager*, *ante*, 64. See, also, *Holmes* v. *Worthington*, 2 F. & F. 533; *Ib.* 238; *Senior* v. *Ward*, 1 El. & El. 385; *Griffith* v. *Gidlow*, 3 Hurl. & N. 648; *Assop* v. *Yates*, 2 H. & N. 768.

Contributory negligence on plaintiff's part disentitles him to a recovery; but knowledge of the incompetence or unfitness of the fellow-servant is only evidence on the plaintiff's part to be submitted to the jury: *Hoey* v. *Dublin &c. Railway Co.* 5 Ir. Rep. C. L. 206.

SALISBURY *v.* SANDS.

1. Under the Organic Act, the legislative authority of the territory of Nebraska could provide, in suits relating to property in the territory, for *personal service upon non residents* outside of the territory, or for constructive service by publication, notwithstanding the provision in section 11 of the Judiciary Act requiring personal service in the district.

2. A *decree of foreclosure* rendered by the territorial court *upon personal service outside of the territory and constructive service* by publication is not void when collaterally attacked, although there may have been defects or irregularities in the proceedings for which the decree might have been reversed on appeal.
3. Legislation of the territory of Nebraska respecting mode of procedure in the territorial courts reviewed.
4. The *territorial district courts* possessed general original chancery jurisdiction, and a forecloure decree therein, when collaterally attacked, is entitled to the usual presumption in favor of the jurisdiction of the court and the regularity of its proceedings.

(*Before* DILLON and DUNDY, JJ.)

Nebraska Organic Act.—Territorial Court Jurisdiction.—Service on Non-Residents.—Validity of Decree.

THE complainant, Mrs. Salisbury, made to the defendant, Sands, in 1858, a mortgage upon certain real property in Omaha, in the then territory of Nebraska. At that time Mrs. S. resided in Omaha, but subsequently removed to, and now resides in, St. Louis, in the state of Missouri; and this bill (filed in this court in 1870, as stated in *Sands* v. *Smith*, 1 Dillon C. C. 290) is to redeem the property from the mortgage. In 1861 the mortgage was foreclosed, or attempted to be, in the proper district court of the territory of Nebraska. The principal controversy between the parties is whether the right to redeem is barred by the foreclosure decree, which the bill charges to be void for want of jurisdiction in the court which rendered it. In respect to those proceedings the bill avers in substance, the following: That Sands brought his bill to foreclose on February 14, 1861, in the territorial district court, and at the November term in that year obtained a decree of foreclosure. It is stated that this decree was void, because the complainant (Mrs. Salisbury) was not served with process, nor was there any publication of the suit as required by statute in case of

non-residents, nor did she appear to the suit. She avers that she resided at the time in St. Louis, and distinctly states that she was not personally served.

The affidavit of publication is alleged by the bill to be defective in that it did not show the cause of action to be of the kind in which service by publication was authorized, nor that complainant could not be served within the territory. It appears from the record of that suit that a subpœna in chancery was issued, February 14, 1861; that the sheriff authorized, by written indorsement thereon, one Rawle to serve it in St. Louis, and Rawle's affidavit, annexed to it, and his testimony taken in this suit, each shows that he served the same by reading it to the complainant in St. Louis, and delivering her a copy thereof on the 25th day of February, 1861, but it does not appear that she was served with a copy of the bill of complaint. The subpœna thus served in St. Louis was returned with affidavit of service annexed, and filed in the court, March 2, 1861. On the same day (March 2, 1861) the attorney for the plaintiff in the foreclosure suit filed an affidavit in the cause stating that the cause of action arose in the territory, and that the defendant therein (present plaintiff) was a non-resident thereof. The affidavit does not state, otherwise than by stating that the defendant was a non-resident, that service could not be made within the territory; nor does it state that the action was for the foreclosure of a mortgage, although the bill showed, as well as the published notice, that such was the nature of the suit.

No order of publication, made by a judge or master, appears in the record of the foreclosure proceeding, but the record thereof contains a notice of publication, dated March 9, 1861, directed to the defendant in the suit (Mrs. Salisbury) stating that a bill of foreclosure was filed, the time when she must plead, and the object and prayer of the bill; and an affidavit of publication in the *Nebraskian* accom-

panies it, showing that it was published in that paper for five consecutive weeks from and after March 9, 1861. The order of court referring the cause to a master, passed October 16, 1861, recites that it appears "that there has been *due service* of process upon the defendant, Lydia A. Salisbury;" and on November 4, 1861, a decree of foreclosure *pro confesso* was entered in due form, on which the property mortgaged was soon afterwards sold to the mortgagee, the present defendant, who entered at once into the possession thereof.

J. M. Woolworth, for the complainant.

Redick & Briggs and *Henry R. Mygatt*, for the defendant.

DILLON, *Circuit Judge.*—It is insisted by the complainant that the decree of foreclosure is void because the service made out of the territory was in violation of section 11 of the judiciary act, which provides that "no civil suit shall be brought before either of said courts (*i. e.* circuit and district courts of the United States) in any other district than that of which he [the defendant] is an inhabitant or may be found at the time of serving the writ."

In my opinion, this restriction did not apply to the territorial courts of Nebraska; at all events, it did not limit the legislative power of the territory under the organic act, which was declared (sec. 24) "to extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of *this act.*" The organic act declared that the district courts of the territory should "possess chancery as well as common law jurisdiction," which jurisdiction "shall be as limited by law." (Sec. 27.) It was not competent for the territorial legislature to deprive the courts of chancery jurisdiction (*Dunphy* v. *Kleinsmith*, 11 Wall. 610); but it was competent for it to provide, notwithstanding section 11 of the judiciary act, that non-

residents (in suits relating to property in the territory) might be served personally outside the territory or by publication in the manner practised in all the states.

On the 1st day of November, 1858, the territorial legislature adopted a code of civil procedure for the territory. On the 4th day of November, 1858, it was specially enacted "the judges of the district courts shall establish rules to regulate remedies and proceedings in chancery." The code expressly authorized summons in certain cases to be served out of the territory, and provided the mode. (Code of 1858, sec. 60.)

In the rules in chancery adopted by the judges under the statute of November 4, 1858, they provided that a subpœna should be the first process in equity, and as to the mode of service and return adopted the provisions of the code of civil procedure, and declared that it should include foreclosure suits.

The civil code provided (sec. 69) for service by publication in certain cases relating to property, and in terms included an action for the sale of real property under a mortgage (sec. 44). The code provides that "before service can be made by publication an affidavit must be filed that service of a summons cannot be made within the territory on the defendant, and that the case is one of those mentioned in the preceding section." When such affidavit is filed, the party may proceed to make service by publication (sec. 70).

The fifth equity rule adopted by the judges also provided for service by publication, but required the affidavit setting forth the facts authorizing service in this mode to be presented to the judge or master, who was to order the publication and name the newspaper.

No such order appears in the record of the proceedings of the foreclosure suit. The code of 1853 contained this provision:—

"Sec. 73. In all cases where service may be made by publication, personal service of a copy of the summons and complaint may be made out of the territory." This section was amended by an act passed January 11, 1861, which provides that section 73 (of the code) be so amended as to read as follows: "In all cases where service may be made by publication, and in all other cases where the defendants are non-residents, and the cause of action arose in the territory, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the territory, by the sheriff or some person appointed by him for that purpose."

Service upon the defendant in the foreclosure suit was made or attempted to be made in two ways: first, by personal service of process in St. Louis; second, by publication in the manner before stated.

The question is, whether the decree rendered on this service is void. It is to be recollected that the court rendering it was one of general original jurisdiction, and that a bill had been regularly filed relating to a subject matter confessedly within its cognizance. I am inclined to think that personal service in a foreclosure suit was authorized by the code (secs. 44, 60, 69, 73) which in terms extends to foreclosure suits, but if not, then by the power which was given to the judges by the special act of November 4, 1858, above mentioned, and their action, expressly adopting by rule those provisions of the code authorizing such extra-territorial service.

If it be conceded that regularly a copy of the bill should have been served with the subpœna, this defect, although one for which the decree might have been reversed, does not make it void.

But I rest my opinion that the decree was not void upon the effect which I give to the publication of the notice.

The code (sec. 44) provides that actions "for the sale of real property under a *mortgage* lien," etc., shall be brought in the county where the subject of the action is situated. Section 69 of the code enacts that "service may be made by publication in either of the following cases: in actions brought under the forty-fourth (44) section of this code, where the defendants reside out of the territory;" and the next section (70) authorizes such publication upon the filing of an affidavit therein mentioned without any order of court. The rules of the judges authorized publication in such cases, but required a previous order of a judge or master.

It is contended by the complainant: First, that the code has no relation to chancery suits, and hence it does not apply to this foreclosure proceeding; and, second, that the power given to the judges "to regulate proceedings and remedies in chancery" did not authorize them to adopt rules on the subject of serving non-residents, either personally or by publication, or, if it did, that their rule was not complied with, because the affidavit for the publication was defective and no previous order was obtained. If these positions are sound, it would probably have the effect to invalidate nearly every decree rendered by the territorial courts against non-residents or their property. I do not agree to the position that no portion of the code can apply to chancery suits. Construing section 69 with section 44, to which it refers, I see no difficulty in holding that it authorized publication in foreclosure suits in the manner therein provided. But if this were not so, and if no part of the code relates or was intended to relate to chancery suits, I could not then resist the conviction that in the special act of November 4, 1858, the legislature intended to confer authority of a most extensive nature upon the judges, one sufficient to authorize them to adopt the rules they did in respect to service by publication.

I therefore place my opinion that the decree was not void upon the ground that here was a publication substantially as required, both by the code and by the rules of the judges. The defects, entirely technical, in the affidavit, do not have the effect to render the decree that was pronounced void for want of jurisdiction. If an *order* of publication were necessary to a regular service in this mode, it may have been made and be lost; at all events, the decree of the court expressly finds that *due service* of process had been made upon the defendants, and in this proceeding, which is not an appeal from, but a collateral attack on, the decree, every presumption is in favor of the regularity of the proceedings and the jurisdiction of the court. The rule is this: Where the subject matter of the suit is one which falls within the cognizance of a court of general jurisdiction, and a petition or bill calling for the exercise of the power of the court is filed, and service of process made, which the court finds or holds to be sufficient, and renders judgment, such judgment, though it may be reversed on error or appeal, is not void for reason of defects in the petition or in the mode of service or return of the officer: *Miller* v. *United States*, 11 Wall. 268, 299, *per* STRONG, J.; *Grignon's Lessee* v. *Astor*, 2 How. 339; *Railroad Company* v. *Stimpson*, 14 Pet. 458; *Cooper* v. *Reynolds*, 10 Wall. 308; *Voorhees* v. *Bank*, 10 Pet. 449, 474; *Morrow* v. *Weed*, 4 Iowa, and authorities there cited; *Hart* v. *Seixas*, 21 Wend. 40; 1 Smith Lead. Cas. 378, and American Notes to *Crepps* v. *Durben*.

Any other rule would unsettle titles, and has nothing to recommend it in a new state, where property is so rapidly increasing in value.

DUNDY, J., concurs.

BILL DISMISSED.

NOTE.—As to jurisdiction and collateral attacks on judgments and decrees, see *Smith* v. *Pomeroy*, *post*.

As to territorial legislative courts: *Clinton* v. *Englebrecht*, 13 Wall. 434.

SMITH v. UNION PACIFIC RAILROAD COMPANY.

Under the act of Congress creating the Union Pacific Railroad Company (12 Stats. at Large, 489, sec. 1), the federal courts have jurisdiction in actions by and against that corporation whenever these courts would have jurisdiction of the same class of actions between other parties.

(*Before Mr. Justice* MILLER.)

Jurisdiction of the Federal Courts.—Construction of Charter of the Union Pacific Railroad Company.

THE plaintiff is a citizen of the state of Ohio, and brings suit to recover damages for injuries received while coupling cars on defendant's road, and while in the employ of defendant as a brakeman.

The defendant demurred to the complaint on the ground that the ccurt had no jurisdiction of the person of the defendant or of the subject matter of the action.

The demurrer was submitted to Mr. Justice MILLER, at the May term, 1872, and taken by him under advisement.

Mr. Redick and *Mr. Howe*, for the plaintiff.

Poppleton & Wakeley, for the defendant.

Mr. Justice MILLER.—The act of Congresss creating the defendant corporation (12 Stats. at Large, 490) contains this provision: "The Union Pacific Railroad Company" by "that name shall have perpetual succession, and *shall be able to sue and to be sued*, plead and be impleaded, defend and be defended, *in all courts of law and equity within the United States*, and may make and have a common seal," etc., (sec. 1).

I have examined the previous decisions of the supreme court of the United states supposed to have an important

bearing on the question now presented, and, after reflection, am still of opinion that Congress intended to make the defendant capable of suing and being sued in the federal courts which have jurisdiction of the same class of actions between other parties.

DEMURRER OVERRULED.

NOTE.—The previous decisions of the supreme court referred to are: *Bank of the United States* v. *Deveaux*, 5 Cranch, 61, 1809, holding that the charter of the Bank of the United States did not enable it to sue in the courts of the United States. The language of the charter was, "to sue and be sued * * in courts of record, or in any other place whatsoever;" *Bank of the United States* v. *Martin*, 5 Pet. 479; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 1824. The court holds in this case that the act of Congress then before it did give, in terms, the bank the right to sue in the circuit court, and that under the constitution it was competent to Congress to confer such jurisdiction. *Bank of the U. S.* v. *Northumberland Bank*, 4 Wash. C. C. R. 168, 1821.

UNION PACIFIC RAILROAD COMPANY *v.* LINCOLN COUNTY AND BARTON, COUNTY TREASURER.

1. *An injunction* to restrain the sale of property assessed as *omitted property* refused, it appearing that the property was taxable, and that if the taxes were paid, the complainant would pay no more than its share of the public burdens.
2. A sale of *personal property* for an illegal tax will not be enjoined—there being an adequate remedy at law; following *Dows* v. *Chicago*, 10 Wall. 108.
3. The *federal courts* will exercise great caution in interfering with the collection of revenues by the states, or their municipal or public agencies.

(*Before* DILLON and DUNDY, JJ.)

Illegal Taxes.—When Equity will interfere.—Injunction.

BILL for an injunction to restrain the sale of three locomotives, seized by the county treasurer to pay certain taxes assessed against the complainant, amounting to about $20,000.

In 1870, owing to the inaccurate return of the complainant of the number of miles of its road lying in Lincoln county, and west to the state line, the assessment made was upon seventy-two miles less of road than the actual amount. In other words, all of the road bed of the complainant, in the unorganized territory west of Lincoln county, and east of Cheyenne county, was omitted. The taxes upon the amount or length of road originally assessed have been paid by the complainant. On the 25th of October, 1871, acting under the authority conferred, or supposed to be conferred, by section 48 of the revenue act of the state, of 1869, the county treasurer reported to the county clerk that seventy-two miles of railroad had been omitted from the tax list of 1870, and thereupon the county clerk entered the same as omitted property upon the tax list or assessment roll in the hands of the treasurer, and the same was assessed at $16,000 per mile, the same rate that the rest of the railroad had been assessed, and the levy of taxes for 1870 was carried out at the same rate per cent as the other taxes. Not being paid, the treasurer of the county seized three locomotives of the complainant, on the 1st day of November, 1871, and has advertised them for sale.

To restrain this sale on the ground that the said tax is illegal and void, an injunction is asked, which, on the hearing, is prayed to be made perpetual.

Poppleton & Wakeley, for the complainant.

Geo. W. Doane, for the defendants.

DILLON, *Circuit Judge.*—The omitted seventy-two miles was taxable property, and there is no doubt that the complainant was liable to pay taxes on the same. (*Union Pacific Railroad Company* v. *Lincoln County*, 1 Dillon, C. C. R., 314.) The omission to have it put upon the tax list at the regular time, was probably occasioned by the act of the com-

plainant's own officer in making the erroneous return to the auditor. If the tax in question is paid, the complainant pays no more than its proportion of the public burdens, and the county collects nothing but what, under the law (had it been complied with by the complainant's officers and the public officers), it is entitled to. This bill is in *equity*, and, as no unjust burden is sought to be imposed upon the complainant, the very groundwork of equitable interference fails. Courts of equity, and particularly the federal courts, sitting in equity in the states, will exercise great caution in interfering with the collection of revenues by the states, or their public or municipal agencies. There must be a plain case of injury, and a plain case of equitable jurisdiction and want of adequate remedy at law to justify the chancellor in arresting, by injunction, the ordinary processes of collection under the revenue laws. (*Dows* v. *Chicago*, 11 Wallace, 108.)

Section 48 of the revenue law of the state authorizes the county treasurer (the collecting officer) to report to the county clerk any land or other property omitted from the tax list, and authorizes the clerk to enter such omitted property upon the assessment roll, to assess its value, and the treasurer to enter it upon his tax list, and to collect the tax as in other cases. This course was pursued in the present instance.

The injunction in this case must be refused on another ground.

The property levied upon and advertised to be sold by the county treasurer (to restrain which the injunction is sought), is *personal* property—so declared by the statute; and assuming (but not deciding), that the action of the county officers, on the 25th day of October, 1871, in assessing, under section 48 of the revenue law, the omitted property, was unauthorized, and assuming that the tax (if valid) is not yet due, still the complainant's case falls within *Dows*

v. *Chicago*, above cited, and he does not show that there i not an adequate remedy at law.

DUNDY, J., concurs.

INJUNCTION REFUSED.

NOTE.—As to equitable jurisdiction to restrain collection of taxes, see *Cleino* v. *Atlantic & Pacific Railroad company*, *ante*, and note.

TAYLOR *v.* GERMANIA INSURANCE COMPANY.

1. The *local agent* of *a foreign fire insurance company*, with power to effect insurance, to sign and deliver policies, and to collect premiums, is, in favor of third persons acting in good faith, presumptively authorized to make a *verbal contract to renew* a risk, and to give day for the payment of the premium in whole or in part.
2. If, by such a verbal contract to renew the insurance, the premium was to be paid on the first day of the succeeding month, which was Sunday, an offer to pay the next day (Monday) would be sufficient, although the house insured had burned down on Sunday.

(*Before* DILLON and DUNDY, JJ.)

Local Insurance Agent.—Power to make Verbal Contract to Renew Insurance.

ACTION on an alleged verbal contract of insurance. No questions were made upon the form or sufficiency of the pleadings. The necessary facts appear in the charge to the jury below given.

Mr. Delaney, for the plaintiff.

Mr. Poppleton and *Mr. Swartzlander*, for the company.

DILLON, *Circuit Judge.*—1. An insurance agent, with power to make and effect insurance, and to issue and deliver policies, to receive and collect premiums, has the power, if no restriction on it be shown, to bind his company by a

verbal contract with the assured at the expiration of the policy, to renew the insurance, and to waive the payment of the premium for the time being, or to give assured time for its payment.

2. In this case the plaintiff sets up such a verbal contract, made, as he alleges, on the 15th day of July, 1869, to extend his insurance for one year from that date, and that the agent of the defendant agreed to wait on him for the premium (except a portion of it paid at the time) until the 1st day of August, 1869. On the 1st day of August, which was Sunday, the property was consumed by fire; and the plaintiff claims that he tendered or offered to pay the premium the next day (Monday), and that the agent refused to receive it. The defendant denies that any such contract was made, and this presents a question of fact for the jury to decide upon the whole evidence and all the circumstances of the case.

3. If such a contract was not made, and the burden of proof to satisfy you of its existence is on the plaintiff, then you should find a verdict for the defendant.

4. If any contract of renewal, and to give time of payment, was made, you should very closely inquire, from the evidence, just what that contract was; and, having ascertained what it was, then whether the plaintiff performed it on his part according to the true meaning, spirit and intent of the contract. You cannot hold the company liable, upon any custom or usage, to renew policies and give time for the payment of premiums, and such evidence, so far as it has been admitted, was admitted only as bearing (so far as you think it has any weight) upon the question whether any such contract as the plaintiff alleges and relies upon was in fact made.

5. If the only contract of renewal was that the defendant was to call in a day or two, or a few days, and pay the premium, and if this time had expired before the fire, then

the company would not be liable, even if after the fire the amount was tendered or offered them.

6. If the contract, if any was made, was that the risk should be renewed, and that the premium was to be paid on the first day of the next month (August), and if the 1st day of August was Sunday, and if the house took fire and was burned on Sunday, an offer to pay the premium on the next day (Monday) would be sufficient. (2 *Parsons Cont.*, 5th ed., 665; *Hammond* v. *Ins. Co.*, 10 Gray, 306.) But there must be an offer to pay at the time, but this may be by the assured or his agent, and if such offer was made, and if the agent of the company denied any liability, or waived payment, and said he would call for the premium, and did not, this would be a sufficient compliance with the duty of the plaintiff to pay the premium.

NOTE.—Power of local agent to make verbal contract to renew. *Baubie* v. *Ætna Insurance Co. ante*, and cases cited in note.

HARRIS, HUTCHINSON, & CO. *v.* BRADLEY & ROBERTSON.

1. In the absence of statute or usage, instruments known as *warehouse receipts* need not be in a particular form.
2. An instrument executed and signed by warehousemen in the following words: "Received in store for account of Bailey & Weightman, 8,000 sacks of corn," is a warehouse receipt, and has an assignable or negotiable quality, and its indorsement and delivery by the persons to whom it was issued to a third person for value, passes the title to the corn, and the makers of the instrument are liable to the holder or assignee, if, without his consent, they afterwards deliver the corn to the persons from whom it was originally received, without the production of the receipt.
3. The statute of Nebraska on the subject of warehouse receipts construed.

(*Before* DILLON and DUNDY, JJ.)

Warehouse Receipts.—Nature.—Rights of Holders.

THIS is an action for three thousand sacks of corn, mentioned in an instrument claimed to be a warehouse receipt, made by the defendants May 26th, 1870, and indorsed to the plaintiffs. The instrument itself, and the circumstances under which it was indorsed to and is held by the plaintiffs, appear in the special verdict of the jury hereinafter mentioned. Under issues presenting the right of the plaintiffs to recover, and denying liability on the part of defendants, the action was tried by a jury, who, under instructions, found a general and also a special verdict. These are as follows:

General verdict: "We, the jury, find the issues in favor of the plaintiffs, and assess their damages at the sum of twenty-five hundred and eighty-four dollars.

"But we, the jury, find also the following special verdict, and submit to the court as a question of law, whether, on the facts thus specially found, the plaintiffs are entitled to judgment, to-wit:

"Special verdict: 1. We, the jury, find specially that the defendants, Bradley & Robertson, being co-partners as alleged in the petition, executed in Nebraska the receipt mentioned in the petition, a copy of which is as follows:

"'NEBRASKA CITY, May 26th, 1870.

"'Received in store for account of Bailey & Weightman, 3,000 sacks of corn.

"'(Signed) BRADLEY & ROBERTSON.'

"And delivered the same in Nebraska to said Bailey & Weightman.

"2. We find that this receipt was endorsed by Bailey & Weightman, and delivered to the plaintiffs, who were partners as alleged in the petition, and commission merchants and

grain dealers, doing business at St. Louis, Mo., on or about June 2, 1870, and that plaintiffs still hold it.

"3. We find that the said Bailey & Weightman delivered the receipt now in suit to the plaintiffs, on or about June 2, 1870, in security for a pre-existing debt, and for advances to be made, and that when this suit was brought, and down to the 1st day of January, 1871, the said Bailey & Weightman owed the plaintiff, on account of such pre-existing debt and such advances, a greater sum than the value of the corn mentioned in the receipt. There is no evidence of the state of the accounts between the said Bailey & Weightman and the plaintiffs since the 1st day of January, 1871, and so we cannot say what sum the said Bailey and Weightman now owe the plaintiffs.

"We find that the defendants were not aware when they issued this receipt in suit, of any special or other arrangement between plaintiffs and Bailey & Weightman, by which the plaintiffs agreed to advance money or become the indorsers of Bailey & Weightman to raise money, and that they should give the plaintiffs, as security, warehouse receipts for grain, or that this receipt was wanted for any such purpose; and we find that before the defendants, Bradley & Robertson, had noticed that the plaintiffs held the receipt in suit, they had, on Bailey & Weightman's order, shipped the corn mentioned in the receipt in suit to Chicago, for the benefit of Bailey & Weightman.

"4. We find that the defendants, Bradley & Robertson, at and before the time the receipt in suit was issued, were chiefly engaged in buying, storing, and shipping grain, and were, at or about the time the receipt was given, mainly engaged in thus buying and shipping grain for Bailey & Weightman on a contingent commission, but that they advertised themselves as doing business as commission and forwarding merchants and grain dealers, and to some extent received, stored, shipped, and forwarded from the boats and to the interior of the country, goods for others.

"The plaintiffs demanded the corn of defendants, Bradley & Robertson, before suit was brought, and they refused to deliver it.

"We find the value of the corn mentioned in the receipt in suit at the time it was demanded by the plaintiffs of Bradley & Robertson, was the sum of twenty-four hundred dollars, which, with interest to this date, amounts to the sum of twenty-five hundred and eighty-four dollars ($2,584), which last sum we find to be the plaintiff's damages, if, on the foregoing facts, the plaintiffs are entitled to judgment."

The plaintiffs now move for judgment on the verdicts, which is resisted by the defendants.

Mr. Wakeley, for the plaintiffs.

Messrs. Redick & Briggs, for the defendants.

DILLON, *Circuit Judge.*—1. The title to the corn, mentioned in the receipt of May 26th, 1870, was in Bailey & Weightman, and the defendants, Bradley & Robertson, were their bailees. The receipt was the evidence of the title of Bailey & Weightman, and the indorsement and delivery thereof in St. Louis to the plaintiffs, the property being then in Nebraska City, was equivalent to the delivery to the plaintiffs of the property itself. The indorsement and delivery of the receipt of the warehouseman in the course of trade, passes the title and right of possession of the property to the party to whom it is so endorsed and delivered. Such is the law, and such is the understanding of the business community. The legal title to the property passed to the plaintiffs by the indorsement and delivery to them of the evidence of the title. To the extent of their advances, certainly they are purchasers for value, if not, indeed, as respects their pre-existing debt, and they hold the title to the corn to protect their interests. When the transfer was made to them, the defendants became *their* bailees, and ceased to

be the bailees of Bailey & Weightman. All the foregoing principles are established by the judgment of the Supreme Court of the United States, in the case of *Gibson* v. *Stevens*, 8 Howard, 884.

2. The defendants insist that the instrument in suit is not a warehouse receipt, either within the contemplation of the local statute of the state on that subject (Rev. Stat. of Neb., p. 652), or of the law relating to this peculiar class of instruments. (See *McNeil* v. *Hill*, Woolworth, C. C. R., 96, where the subject is discussed by Mr. Justice MILLER.)

The fourth special finding of the jury shows that the defendants were engaged in buying, *storing, and shipping* grain generally, and particularly for Bailey & Weightman (to whom the receipt was issued), on a contingent commission. The defendants advertised themselves to the world as merchants and grain dealers. Clearly they were warehousemen, and it is to be presumed that they were known as such to the business community.

It is urged that the instrument in suit was not intended to be a warehouse receipt, or to be used or negotiated as such, but was intended simply as a memorandum or personal voucher to Bailey & Weightman to show that the defendants had that amount of corn in store for them; and this view, it is argued, is supported by the nature or tenor of the paper itself, since it contains no words indicating that the defendants are to account to any persons other than Bailey & Weightman.

In other words, it is claimed by the defendants, as a matter of law, that in order to give to such an instrument, even when issued by a merchant or warehouseman, a negotiable or assignable quality, so as to estop the makers from showing against a subsequent holder that the property mentioned has not been in fact received, or had, before notice of the assignment, been delivered to the persons to whom the instrument was originally made, the instrument should con-

tain language showing that it was to be, or might be thus used. If the receipt in question had contained, after the name of Bailey & Weightman, the words "or order," or after the word corn, the words "delivered in virtue of this receipt," or similar language, it is conceded that it would have the qualities of a warehouse receipt, and that a delivery to any person without the production of the receipt, would be at the peril of the warehouseman or party making it. No authorities have been produced to sustain this view; nor is it shown that there is any such custom or usage among warehousemen, or known to the business community.

There is nothing in the statute of the state requiring or implying that such instruments should be of any particular form, and the instrument on which the plaintiffs rely for title would seem to be more formal than some of those in the case of *Gibson* v. *Stevens*, before cited.

Under these circumstances, it is my opinion that the defendants were not justified, with this receipt outstanding, in shipping the corn mentioned in it, as the jury find they did, to Chicago, for the benefit of Bailey & Weightman.

JUDGMENT FOR PLAINTIFF.

NOTE.—DUNDY, J., did not concur in the foregoing views, and, after judgment for the plaintiffs, in accordance with the opinion of the circuit judge, the case was certified to the supreme court upon division of opinion, on the question whether, upon the special verdict, the plaintiffs were entitled to judgment.

The following is the statutory provisions referred to in the opinion (*Revised Statutes of Nebraska*, p. 652):

"To prevent fraud in warehousemen and others.

"SECTION 246. No warehouseman, wharfinger, or other person, shall issue any receipt or voucher for any goods, wares, merchandise, grain, or other produce or commodity, to any person or persons purporting to be the owner or owners thereof, unless such goods, wares, merchandise, or other produce or commodity, shall have been *bona fide* received into store by such warehouseman, wharfinger, or other person, and shall be in store and under his control at the time of issuing such receipt.

"SEC. 247. No warehouseman, wharfinger, or other person, shall issue any receipt or other voucher upon any goods, wares, merchandise, grain, or other produce or commodity, to any person or persons, as security for any money loaned, or other indebtedness, unless such goods, wares, merchandise, grain, or other produce or commodity, shall be, at the time of issuing such receipt, the property of such warehouseman or wharfinger, or other person, and shall be in store and under his control at the time of issuing such receipt or other voucher, as aforesaid.

"SEC. 248. No warehouseman, wharfinger, or other person, shall issue any second receipt for any goods, wares, merchandise, grain, or other produce or commodity, while any former receipt for any such goods or chattels, as aforesaid, or any part thereof, shall be outstanding and uncanceled.

"SEC. 249. No warehouseman, wharfinger, or other person, shall sell or encumber, ship, transfer, or in any manner remove beyond his immediate control, any goods, wares, merchandise, grain, or other produce or commodity, for which a receipt shall have been given as aforesaid, without the written assent of the person or persons holding such receipt."

BARTHOLOMEW, Assignee, v. WEST, *et al.*

1. Under the statute of Nebraska relating to the *homestead exemption*, the head of the family need not be the sole owner of the fee; it is sufficient, if the other requisites concur, that he has such an interest in the land as may be sold on execution.
2. The right to the homestead exemption is not lost by the delay of the husband to claim it until an order is applied for by the assignee in bankruptcy to sell the property for the benefit of the estate.

(*Before* DILLON, *Circuit Judge.*)

Nebraska Homestead Statute Construed.

THIS is a petition by the assignee under the second section of the bankrupt act, to review an order of the district court refusing the application of the assignee for an order to sell lot 8 in block 66, in the town of Blair. The ground of the refusal was that the property was exempt as a homestead. The claim of the bankrupt to a homestead is based

upon the amendment to section 525 of the code of Nebraska, which provides:—

"A homestead consisting of a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, *owned* and occupied by any resident of the state being the head of a family, shall not be subject to attachment, levy, or sale, upon execution or other process issuing out of any court of this state, so long as the same shall be *owned* and occupied by the debtor as such homestead." (Act June 22, 1867, 1st, 2d, and 3d sess. laws of Nebraska, 91.)

In January, 1870, a petition in bankruptcy was filed against West & Lewis, and they were subsequently adjudicated bankrupts. West, one of the bankrupts, makes the claim in this case to the homestead exemption.

At a prior term of this court a decree was entered in favor of the assignee, setting aside as fraudulent the conveyance of the property to the wife of the bankrupt, but reserving all rights of homestead.

The other necessary facts appear in the opinion.

William O. Bartholomew, for the petitioner for revision.

James W. Savage and *Carrigan & Osborn*, for West.

Dillon, *Circuit Judge*.—In March, 1869, the firm of West & Lewis determined to remove to the new town of Blair, then just laid out, with a view to reside and do business. Their lots were purchased mostly on credit, and a title bond received. On one of the lots a store building was erected; on another Lewis erected a house for a home for himself and family; and on the other—the lot now in question—a house was erected in the summer of 1869 by West, who at once moved into it with his family, where they have since resided. In December, 1869, the title bond, which had been

taken in the name of the members of the firm of West & Lewis, was assigned to West's father without consideration. The father thereupon procured the legal title from the town proprietor, and after the bankruptcy of West & Lewis, the father conveyed the lot to Mrs. West without any valuable consideration. In January, 1870, the firm was thrown into bankruptcy. At a former term the court decided that the assignment of the title bond and the conveyance to the wife were fraudulent as against the assignee, and a decree was entered to the effect that the property was subject to the payment of the debts of the bankrupts, *reserving, however, all right to a homestead*, such right not being put in issue in that suit.

In that case the wife made an ineffectual attempt to show that the lot was purchased and paid for with her money. It appears that she was possessed of some property, that it was sold and the proceeds delivered to the husband, who also put them into the firm, and that when the cash payment was made on the lot, and some of the payments for the improvements, it was out of money or means drawn by the husband from the firm; but there is no satisfactory evidence that the property was otherwise purchased with her money, or that it was held in trust for her.

I find from the evidence, although the title bond was taken in the name of the firm, that in point of fact the understanding of the members of the firm was that Lewis should own in severalty the lot on which he built his house, and that West should own in severalty the lot in question.

The assignee resisted the claim to a homestead, first, on the ground that the lot or property was either partnership property, or held by Lewis & West as tenants in common, and that the statute of Nebraska does not give a homestead unless the party claiming it is the *sole owner*.

But I find that, in fact, it was not partnership property as respects the co-partners, nor was it held by them as tenants in common. But if it were owned by them as tenants in common, I do not admit that a homestead right could not be asserted to it in favor of the head of a family who would otherwise be entitled to the exemption. The authorities, however, are conflicting: 1 Am. Law Reg. (N. S.) 652, 654, 655, and cases cited. See, also, and compare, *Thurston* v. *Maddocks*, 6 Allen, 427; *Smith* v. *Smith*, 12 Cal. 216; *McNeade* v. *Whaley*, 31 Cal. 531; *Thorn* v. *Thorn*, 14 Iowa, 49.

But it is not now necessary to decide the point, as I find Lewis & West were not tenants in common in respect to this lot, but that there had been an equitable partition of the lots purchased, and that this was West's.

When the statute speaks of property *owned* by a debtor, it does not mean that the ownership must be of the full legal title. It is sufficient that the interest be such as may be sold on execution or subjected to the payment of debts. And although the husband in this case had only a title bond, this made him the owner in such a sense as to entitle him, the other requisites concurring, to the benefit of the statute of Nebraska on the subject of homestead exemption: 1 Am. Law Reg. (N. S.) 652, and cases cited; *Pelan* v. *De Bevard*, 13 Iowa, 53. See, also, *Stewart* v. *Brown*, 37 N. Y. 350.

It is next insisted that if West were otherwise entitled to a homestead, the right has been lost by reason of the fraudulent assignment of the title bond to his father, and the subsequent conveyance to the wife. If it had appeared in the other suit that the property was exempt as a homestead, and that creditors had no claim upon it, the court would undoubtedly have dismissed the bill of the assignee. But I have elswhere held that where a fraudulent convey-

ance is made and set aside at the instance of the assignee, the husband or head of the family is not estopped to set up the right to a homestead exemption: *Cox* v. *Wilder*, *ante*, p. 45. To that view I still adhere.

I am of opinion that the right to the exemption has not been lost by delay. When the assignee applied for an order to sell the property, it was competent for the husband to resist it, as he did, on the ground that the property was his homestead and exempt as such.

The petition for review is dismissed.

PETITION DISMISSED.

NOTE.—*Cox* v. *Wilder*, *ante*, p. 45, and cases cited in note; *In re Cross post*, and note.

HARRY G. STOUT, by his next friend, *v.* SIOUX CITY & PACIFIC RAILROAD COMPANY.

1. Under certain circumstances, a railroad company may be liable, on the ground of negligence, for a *personal injury to a child* of tender years in a town or city, *caused by a turn-table*, built by the company upon its own uninclosed land, and which is left unguarded and unlocked in a situation which renders it likely to cause injury to children.
2. *Negligence defined*, and the necessary elements of such a liability in respect to unguarded and unlocked turn-tables stated.

(*Before* DILLON and DUNDY, JJ.)

Negligence.—Liability of a Railroad Company for an Injury to a Child, caused by an Unguarded and Unfastened Turn-table.

THIS is an action by an infant, by his next friend, to recover damages for a personal injury, caused by the *turn-table* of the defendant. The material facts appear in the charge of the court to the jury, given below.

Wakeley & Strickland, for the plaintiff.

N. M. Hubbard and *Isaac Cook*, for the defendant.

Dillon, *Circuit Judge.*—1. This is both a novel and important case. The injury for which this action is brought happened in the town of Blair, in this state, on the 29th day of March, 1869. The plaintiff was then a boy of the tender age of six years and two or three months. The undisputed testimony shows that the town of Blair was, at that time, a new place, had been recently laid off, and contained a population of about one hundred people. On the plat of the town of Blair is a tract of land of variable width, extending almost the entire length of the plat, owned and used by the defendants for their road-bed and depot grounds, and which divides the town into two portions. The cross streets of the town run up to this railroad ground and there stop, with exception of one or two streets, which were laid out across it. On this ground, which was not enclosed, was situated the defendant's depot house, and, about one-quarter of a mile distant from the depot house was located the turn-table, on which the plaintiff was injured. There were but few houses in the immediate neighborhood of the turn-table, and the plaintiff's parents lived in another portion of the town, and about three-fourths of a mile distant from the turn-table.

The circumstances under which the accident to the plaintiff occurred are not in the main, if in any respect, in dispute. The plaintiff, without, as it appears, the knowledge of his parents, started with one or two other boys to go to the defendant's depot, about half a mile away, with no definite purpose in view. When the boys had arrived at the depot, it was proposed by some of them to go to the turn-table to play; and the boys proceeded to the turn-table, about a quarter of a mile distant, traveling along the defendant's road-bed or track. When the boys had reached the turn-table, which was not attended or guarded by any employe of the company, and which was not then fastened

or locked, and which revolved easily on its axis, two of them commenced to turn it, and the plaintiff, in attempting to get upon it (being at the time upon the railroad track), had the misfortune to get his foot caught between the end of the rail on the turn-table, as it was revolving, and the end of the iron rail on the main track of the defendant's road, and his foot was badly cut and crushed, resulting in a serious and permanent injury.

There is the evidence of one witness (Quimby), then an employe of the company, that he had previously seen boys playing at the turn-table, and had forbidden his children to play there. But this witness had no charge of the turn-table, as he says, and did not, as he testified, communicate the fact to any of the officers or employes of the company having charge of the turn-table. It appears, from the plaintiff's testimony, that he had not before that day been engaged in playing at the turn-table. The turn-table was constructed on the defendant's own land, and the testimony tends to show that it was constructed in the usual and ordinary manner.

2. Now the ground of complaint against the defendant, as set out in the petition, is that the turn-table, as it was constructed, was of a dangerous nature and character, when unlocked or unguarded, and that being, as it is alleged, in a place much resorted to by the public, and where children were wont to go and play, it was the *duty* of the defendant to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded, so as to prevent injuries such as befel the plaintiff.

The basis of this action, therefore, is that the defendant owed the plaintiff a duty of this kind; that, in failing to discharge this duty, the defendant was guilty of negligence; that this neglect caused the injury to the plaintiff, and that, therefore, the defendant is liable in damages therefor.

Now, if this action had been brought, under the circumstances disclosed in the evidence, by *an adult*, who, himself, meddled with and set in motion the turn-table which caused the injury, we should have no hesitation in saying that the law would not allow it to be maintained. And we confess that we have had serious doubts whether, under the circumstances, the action was any more maintainable, being brought by an infant of tender years.

On reflection it is our judgment, and we so instruct you, that this action may be maintained, if certain facts be established by the evidence.

In the first place, it is alleged in the petition, and it must appear by the evidence, that this turn-table, in the condition, situation, and place where it then was, was a dangerous machine, one which, if left unguarded or unlocked, would be likely to cause injury to children. You have heard described the manner in which this turn-table was constructed and left, and very much evidence has been adduced to show that turn-tables are constructed and left in this manner elsewhere; and the evidence is quite undisputed that it is not the practice of railroads to guard or lock them. The circumstance that other roads throughout the country do not guard or fasten turn-tables (if you find such to be the fact), is not conclusive in the defendant's favor that there was or could be no negligence on its part as respects the turn-table in question, but, while not conclusive, it is still a very important fact or circumstance to be considered by the jury in determining the question of the defendant's negligence.

This action rests, and rests alone, upon the alleged negligence of the defendant, and this negligence consists, as alleged, in not keeping the turn-table guarded or locked. Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which

ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation.

If the turn-table, in the manner it was constructed and left, was not dangerous in its nature, then of course the defendants would not be guilty of any negligence in not locking or guarding it. But even if it was dangerous in its nature in some situations, you are further to consider whether, situated as it was on the defendant's property, in a small town, and distant or somewhat remote from habitations, the defendants are guilty of negligence in not anticipating or foreseeing, if left unlocked or unguarded, that injuries to the children of the place would be likely to or would probably ensue.

The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turn-table to play, or did not know, or had no good reason to suppose, that if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them.

But if the defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turn-table to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence. Counsel for the defendant disclaim resting their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defense upon the ground that the company was not negligent, and claim that the injury

to the plaintiff was accidental, or brought upon himself. The defendants are not insurers of the limbs of those, whether adults or children, who may resort to their grounds; and there are many injuries continually happening which involve no pecuniary liability to any one.

To find against the defendant you must find that it has been guilty of neglect, of a wrong, of a want of due and proper care in the construction of machinery of a dangerous character, and, so leaving it exposed as before explained, that, as reasonable men, the officers of the road ought to have foreseen that an accident, happening as this happened, would probably occur, or be likely to happen.

NOTE.—The cause was previously tried before DUNDY, J., and the jury failed to agree. His charge on that trial will be found in 11 Am. Law Reg. N. S. p. 226.

On the second trial the jury found a verdict for the plaintiff, and the court signed a bill of exceptions, and a writ of error was sued out. The statement of facts in the foregoing charge of the circuit judge was not objected to by either party, and the main ground of exception on the part of the company, was that the case was allowed to go to the jury, it contending that the jury should have been directed, as a *matter of law*, that the company, in respect to its turn-table, owed no duty towards, and hence was under no liability to, the plaintiff. See *Brown* v. *Railroad Co.*, 58 Maine, 384.

UNITED STATES v. JAMES C. MACKOY, *et al.*

1. *Nature of the lien* of the government, under the act of July 20, 1868 (15 Stats. at Large, 167), *for taxes due it from distillers*, and the *remedy* for enforcing such taxes considered.
2. Where property is siezed, its subsequent *release on bond* does not divest the court of jurisdiction to go on with the condemnation proceedings.
3. *The effect of such release* is that the property may be sold by the owner *bona fide*, and give the purchaser a good title; but, excepting where it

will interfere with the rights of third persons, acquired after the release, and upon the faith of it, the court may re-seize the property, and order it to be sold.

4. A sale made to a purchaser under such a re-seizure sustained; and, under the circumstances stated, the sale was held to pass to the purchaser all the interest of the United States, and the *United States was held estopped* to set up against him any lien thereon in existence and known to it when the order of sale was made.
5. The *jurisdiction of the district court*, as a revenue court, of condemnation proceedings against a distillery, is not defeated by the subsequent bankruptcy of the owners of the distillery.
6. Where *the fund*, arising from the sale of distillery property under condemnation proceedings, *is in the district court*, and the proceedings are there still pending, the circuit court, on an original bill in chancery, cannot withdraw that fund from the district court, or direct how it shall be distributed. Whether, under the internal revenue act of July 20, 1868 (15 Stats. at Large, 167), the lien of mechanics and of judgment creditors, which attached before the acts were done or suffered for which the property was forfeited, has priority over the claims of the government under the forfeiture, *quaere*.

(*Before* DILLON and DUNDY, JJ.)

Internal Revenue Act.—Forfeiture of Distillery Property.—Release on Bond.—Right to Re-seizure.—Sale under Re-seizure.—Purchaser's Title.—Respective Jurisdiction of District and Circuit Court.

THIS is a bill filed in this court under section 106 of "An act imposing taxes on distilled spirits," etc., approved July 20th, 1868. (15 Stats. at Large, 167.) It is shown by the testimony that the property upon which the distillery of Mackoy & Co. was erected, was purchased by Mackoy, August 12th, 1868; that he immediately commenced the erection of the distillery thereon; that, on the 3rd day of October, 1868, Mackoy & Co. gave the bond required by section 7 of the act cited, and on the 28th day of October, 1868, they commenced distilling; that they continued distilling until the 22d day of December, 1868, at which time their distillery was seized by the collector for violation of

the revenue laws; that an information was filed in the district court December 28th, 1868; and that, on the 14th day of January, 1869, the property was released to the claimants, Mackoy & Co., by order of the district judge, upon a satisfactory bond being given, as required by law, in the sum of $15,410.00, the appraised value of the property seized. On the 1st of February, 1869, they resumed distilling, but did not continue to exceed four weeks.

Their operations in rectifying were of brief continuance, commencing about December 10th, 1868, and continuing only to the time of seizure (Dec. 22d, 1868), and never resumed afterwards. The total amount of taxes assessed against the distillery was $7,980.00, and against the rectifier, $540.00, and of this the amount assessed *subsequent* to January 14th, 1869 (when the property was released from seizure), was $4,888.50. On April 30th, 1869, a petition in bankruptcy was filed against Mackoy & Co., and May 29th, 1869, they were adjudged bankrupts. Patrick was elected assignee in bankruptcy, July 6th, 1869, and, on the 13th of July, a deed of assignment was made to him by the register in bankruptcy. On September 2, 1869, a trial was had in the district court, under the proceedings instituted for violation of the revenue laws, and a *judgment of forfeiture and condemnation entered*, and, on the 8th of February, 1870, a judgment was rendered against the sureties on the bond which had been given for the release of the property. A motion was then made on behalf of the sureties, that the property be ordered to be sold under the judgment of condemnation, and the proceeds applied to the satisfaction of the judgment rendered against the sureties. On the 15th of January, 1870, a petition was filed in the United States district court by Patrick, as assignee, for an injunction to restrain the sale of the property by the sheriff of Douglas county under certain executions which he held against

Mackoy & Co., and in favor of certain judgment creditors, and praying for an order authorizing him to sell the property, under section 25 of the bankrupt act. Pending this petition, and the motion on behalf of the sureties above named, an order was made by the district court, on the 14th of February, 1870, overruling the motion of the sureties, but directing the marshal to sell the property, and return the proceeds into court for future order. The property was sold accordingly by the marshal to the defendant, Mageath, and an order confirming the sale entered May 21, 1870, and a deed executed to the purchaser, May 31, 1870. On December 16th, 1870, an action was commenced by the district attorney on the distiller's bond, to recover the taxes assessed and unpaid, which is still pending in the district court.

The present bill was filed in this court January 15th, 1870, and recites the afore-mentioned proceedings in the district court, and makes defendants thereto the assignee in bankruptcy, various lien creditors of Mackoy & Co., the sureties on the bond given January 14th, 1869, for the release of the distillery, the purchaser of said distillery property at the sale by the marshal, and also certain persons claiming to be entitled to the rights of informers.

The bill sets forth that there is due the United States from Mackoy & Co., as taxes due from October, 1868, to March, 1869, inclusive (which covers the whole period during which the distillery was operated by them), the sum of $11,264.85, and it asks to have the property subjected to the payment thereof, or if this be not done, that the proceeds of the sale of the property by the marshal be appropriated to the payment of such taxes, and to have the rights and equities of the various defendants settled. Answers have been filed by the several defendants, and the cause has been submitted upon the pleadings and proofs.

Jas. Neville, district attorney, for the United States.

John I. Redick, *J. M. Woolworth*, *Geo. W. Doane*, *G. W. Ambrose*, *B. E. B. Kennedy*, and *E. Wakeley*, for the defendants.

Dillon, *Circuit Judge*.—This bill is brought in this court under section 106 of the act of July 20th, 1868 (15 Stats. at Large, 167), to enforce the lien of the United States upon the distillery property which belonged to Mackoy & Co., for taxes which were assessed against them from October, 1868, to March, 1869, inclusive, covering the whole period during which the firm operated the distillery. A portion of these taxes accrued prior to the seizure of the property, on the 22d day of December, 1868, and a portion after the property was released on bond (which was on the 14th day of January, 1869), and placed again in the hands of Mackoy & Co. Pending the proceedings in the district court to have the property declared forfeited, Mackoy & Co. were adjudicated bankrupts.

Afterwards, viz: September 2d, 1869, judgment of forfeiture was entered against the distillery property. The bond which had been given for the release of the property (Jan. 14th, 1869), was conditioned to the effect that if the property shall be condemned as forfeited, the obligors will thereupon pay into court the appraised value thereof, viz: $15,410.06.

On the 8th day of February, 1870, judgment was rendered against the sureties on this bond for the amount of the appraised value of the property.

On the 14th day of February, 1870, the court overruled the motion of the sureties to have the property sold and the proceeds applied towards the satisfaction of the judgment against them, but at the same time caused to be entered of record an order "that the marshal do proceed to sell, after

giving thirty days notice, the property heretofore seized in this proceeding, and return the proceeds arising therefrom into the registry of this court, to abide the further order of the court."

Pursuant to this order, the marshal sold the distillery property May 3rd, 1870, to S. D. Mageath, for $12,100, and the rectifying establishment to the same person for $2,800, and the proceeds of such sales are still in the registry of the district court. This sale was confirmed by the district court, and the purchaser, after the confirmation, and before this bill was filed, had made improvements upon the property to the amount of $24,000.

Respecting this sale, the present bill contains the following averment: "That the order for said sale was made by the district court, at the request, and by the consent of all parties interested in the said property."

When the United States asked for or consented to the sale of the property, the present bill, subsequently amended, had been filed in this court, asking to have the taxes declared to be a lien upon the distillery property.

When the sale was ordered the property was lying idle, and becoming dilapidated. After the sale was made it was repaired and improved, and has since paid revenues to the government to an amount stated to exceed $200,000. These circumstances vindicate the propriety of ordering the sale, but the question is now made that the sale is void on the ground that the district court had no jurisdiction to order it, because the property had been released upon bond, and was not then in its custody.

It ought to be mentioned that, subsequent to its release on bond, it had again, May 11th, 1869, been seized by the collector *for non-payment of taxes*, and advertised for sale, July 2, 1869, but that, before that date, to-wit: June 30th, 1869, the proceedings under this seizure were abandoned,

and the district attorney instructed to commence proceedings upon the bond, given under section 7 of the act of July 20, 1868.

I am of the opinion that the district court had jurisdiction to order the sale of property, and that the sale which was made to the purchaser, who has acted in good faith upon it, must be upheld.

By the act of July 20th, 1868, the government has a bond for the security of taxes which may accrue to it (Sec. 7), and taxes due it are made a lien upon the property from the "time the spirits are distilled until the said tax shall be paid" (Sec. 1), and the lien for taxes may be enforced by a bill in chancery, filed in a district or circuit court of the United States (Sec. 106). Such taxes are made a lien or incumbrance on the property.

Other provisions of the statute, however, denounce an absolute forfeiture, by the owner, of all his interest in the property, to the United States for certain acts and omissions of the distiller, and it was for such acts and omissions that it was seized, on the 22d day of December, 1868, and subsequently judicially declared to be forfeited by the government. The release of the property on bond does not divest the court of its jurisdiction to go on with the condemnation proceedings. (*The Little Charles*, 1 Brockenb. 347.)

The effect of a release of the property on bond is, that it may be sold *bona fide*, and give the purchaser a good title, or liens or rights may be acquired after such release, which will be protected; but, saving the rights of purchasers and third persons, lawfully acquired after the release, I think the court may, if it sees proper, as where the bond is worthless and the property is accessible, or where it has been deceived into taking inadequate security, or where justice will be promoted by such a course, re-seize the property, and

order the same to be sold. (See the *Gran Para*, 10 Wheat. 497; *The Little Charles*, 1 Brockenb. 347; *The Empire*, 1 Bened. 19; *The Jewess*, Ib. 21, note, per BETTS, J.; compare *The Union*, 4 Blatchf. 90; *The Hero*, Brown & Lush. 447.) And this was, in substance, the nature of the order upon which the property was sold. As that proceeding was pending when the bankruptcy of Mackoy & Co. (the claimants) occurred, it is evident that the jurisdiction of the district court, as a revenue court, was not divested by that event. The title to the property passed, therefore, to Mageath, under the sale and deed to him by the marshal, and this sale was one made for the benefit of the United States, as the owner of the property, by reason of the forfeiture of the same to it.

At the time of the sale the United States was the owner of the property, under a forfeiture judicially ascertained, and had been such owner from the time of the violation of the law, for which it was seized. (*Gilson* v. *Hoyt*, 3 Wheat. 246, 311; *U. S.* v. 1960 *Bags of Coffee*, 8 Cranch, 398.)

Perhaps an order might have been made to sell the property subject to the lien of the United States for taxes, but no such reservation was made. There is no evidence to show that the United States intended to keep alive a tax lien upon the property. On the contrary, there is evidence that it abandoned the proceedings by which the property had been seized to secure the taxes now sought to be enforced, and the district attorney was instructed to commence suit on the bond.

Under the circumstances my judgment is, that the marshal's sale and deed passed and conveyed to the purchaser all of the interest of the United States in the property sold, and that the United States is estopped to set up as against the purchaser any lien thereon for taxes in existence, and known to it at the time the order for the sale was made. (*Mills* v. *Comstock*, 5 Johns. Ch. 214; *Starr* v. *Ellis*, 6 Ib. 363.)

It is distinctly admitted on the face of the present bill that the government consented to the order of sale, and it is quite plain upon the evidence that it was the intention to sell, to whomsoever should purchase, a clear and perfect title, and that the parties interested should litigate thereafter over the proceeds of such sale. As against the government, which, if it did not procure the order of sale, consented to it, the purchaser takes all its interest. *Frische* v. *Kramer*, 16 Ohio, 125; *Jackson* v. *Bowen*, 7 Cow. 13.

If the foregoing views are correct, the bill, so far as it seeks to enforce a lien upon the property purchased by Mageath, must fail. Can it be retained for the purpose of settling the rights and equities of the different parties with respect to the fund produced by the sale?

That fund is in the district court, and not in this court. It was returned there to abide its further order. That court is entitled to retain the fund, and itself to make orders disposing of it, and its action in this respect is subject to revision here in the usual mode. But this court cannot lay its hands upon that fund, and withdraw it from the district court, nor can it enter a decree directing how that fund shall be disposed of. The jurisdiction of that court continues until the proceedings out of which the fund arose are ended, and the final order for distribution made.

Among those asserting an interest in the fund are two persons who claim as informers, and whose rights have never been determined. The express provision of the law is that those rights shall "be ascertained by the court which decrees the forfeiture" (Act of June 30th, 1864, Sec. 179), which is the district court, and not this court. Among those, also, who make a claim upon the fund, are certain mechanics, who furnished the material for, and did work upon the distillery prior to its seizure, and certain judgment creditors of Mackoy & Co. and also the assignee in bank-

ruptcy. These lienors did not intervene in the condemnation proceedings, and hence are bound by the decree therein, and cut off thereby from all resort to the property sold. (*The Mary*, 9 Cranch, U. S., 126.) But they may, notwithstanding the decree of condemnation, and while the fund is still in court, apply in proper manner to establish their alleged rights and equities in respect to it. (*The Siren*, 7 Wall. 152, 159; *Ins. Co.* v. *Cargo, etc.* Olcutt, 89; *Andrews* v. *Wall*, 3 How. 568; *The Sibyl*, 4 Wheat. 98; *Keen* v. *Gloucester*, 2 Dall. 36.) But this application must be made to, and in the first instance decided by, the court in which the fund remains.

Whether, under the peculiar provisions of the act of July 20, 1868, (see sections 1, 7, 8, 44, 106), the liens of mechanics and judgment creditors, which, under the laws of the state, fully attached before the acts were done or suffered for which the property was forfeited to the United States, have priority over claims of the government under the forfeiture, is a question upon which I do not find it necessary or deem it proper to give any opinion at this time.

In any event, all interest of Mackoy & Co. in the property was forfeited to the government, and this forfeiture has been judicially ascertained and decided, and, therefore, it is not perceived what interest the bankrupt's estate has in the fund. The argument that the sale was void because not made by the order of the bankruptcy court, and that the bankruptcy court alone has jurisdiction to settle the equities of all parties to the fund, and to distribute it, has no foundation upon which to rest, for the reason that the decree of condemnation conclusively settles that the bankrupts had forfeited all their rights in the property before the petition in bankruptcy was filed, and it is certain that such forfeiture is not subject to the rights of general creditors.

The bill filed in this court must, therefore, be dismissed; but since all parties have taken proofs to sustain their re-

spective claims, I recommend that by agreement all the pleadings and proofs be filed in the district court, and the cause submitted thereon to it, reserving, if desired, the right of all parties to appeal. This will save time and expense, and facilitate the closing of this complicated and already long protracted litigation.

No costs will be allowed to any of the parties.

DUNDY, J., concurs.

BILL DISMISSED.

NOTE.—*Lien for tax as against innocent purchaser.* Sec. 32 of the act of July 13, 1866 (14 Stats. at Large, 157), was construed by Mr. Justice SWAYNE in the U. S. circuit court for the southern district of Ohio, in the case of the *United States* v. *Turner Brothers and Stoltz,* 18 Int. Rev. Record, July 5, 1873, page 5. The case was heard upon bill brought to subject a distillery into payment of tax upon whiskey, claimed to be a lien thereon. The tax accrued in February, 1867, while the Turners were owning and operating the distillery. It was, in the same month, removed upon transportation bonds, but was, without the payment of tax, sold in the markets. Suits were begun in September, 1867, upon the bonds, and judgment recovered thereon in March and April, 1871, for the aggregate sum of $31,533.26. In June, 1867, the Turners sold their distillery, and in April, 1868, Stoltz became the innocent owner for value. In his answer Stoltz claimed: First, that being an innocent purchaser, without notice of the alleged lien of the government, he took the premises discharged therefrom. Second, that the lien of the United States upon the distillery for tax is upon the whiskey, and was discharged by the taking of the transportation bond. Justice SWAYNE held that the provisions of section 32 of the act of July 13, 1866, upon which the claim of the plaintiff is founded, providing that the tax in question should be a lien on the interest of said distiller in the tract of land whereon the said distillery is situated from the time said spirits are distilled until said tax should be paid, is absolute and unconditional, and secures to the government a lien upon the distillery premises as against innocent purchasers without notice. The learned justice alluded to a case he had decided some years previously, in which he had held, after consideration, that the lien of the government for unpaid taxes, under the same section, upon spirits fraudulently recovered from the distillery, was good as against innocent purchasers. Decree was passed in favor of the government for sale of the property.

UNION PACIFIC RAILROAD CO. v. JAMES R. WATTS.

1. The land grant to the Union Pacific Railroad Company (12 Stats. at Large, 492, sec. 3) excepts, *inter alia*, lands to which *homestead claims* had attached at the time the line of the railroad was definitely fixed: *Held*, that this exception did not operate in favor of a sham and fraudulent homestead claim.
2. What would constitute such a claim, illustrated.

(*Before* DILLON and DUNDY, JJ.)

Union Pacific Railroad Company.—Construction of Land Grant.

EJECTMENT for one hundred and sixty acres of land. No questions arise on the pleadings. The plaintiff introduced a patent for the land in dispute, dated February 23, 1871, made under the act incorporating the plaintiff, July 1, 1862 (12 Stats. at Large, 489), and rested.

Defendant was in actual possession, and claimed that this land was excepted out of the grant to the plaintiff, of July 1, 1862 (12 Stats. at Large, 492, sec. 3), because before the definite location of the plaintiff's line of road there was a homestead right thereon in favor of one Peter Hugus.

On the trial the defendant offered evidence of the filing of papers by Hugus, December 5, 1863, to obtain a homestead right under the act of Congress in that behalf. Plaintiff, in rebuttal, produced the said Hugus as a witness, who testified, in substance, as follows:—

"I am same person that, on December 5, 1863, made a homestead filing on this quarter section; never made but one such filing; I had never seen this land before I made that filing; I made it as a great many others made them in those days; four of us agreed to build one house on the four corners of the section; two of them abandoned the scheme, and when they did, I gave the whole thing up, and we never went on to this land; never made any improvement upon it; I lived in Omaha then, and ever since, and

never moved on to the land, and never saw it. Afterwards, Mr. Davis, land agent of the Union Pacific Railroad Company, called upon me, and refunded what I had paid, about $10, and I relinquished my right to the company; I never had any intention of improving this land or of moving on to or entering it; I did not know where it was, except that it was between the Elkhorn and Platte rivers; the land office at the time was in Omaha."

On cross-examination, he said: "I was a citizen of the United States, and a resident of Nebraska; I filed upon it with intention to procure it in the same manner as other people did at that time; Mr. Davis, agent of the Union Pacific Railroad Company, called upon me to relinquish; he paid me the amount I paid United States local land officers to make the filing, about $10."

The grant of public lands by Congress to the Union Pacific Railroad Company (12 Stats. at Large, 492, sec. 3), is "of five alternate sections per mile on each side of said railroad, on the line thereof, * * * not sold, reserved, or otherwise disposed of, by the United States, and to which a pre-emption or *homestead claim may not have attached* at the time the line of said road is definitely fixed."

Mr. Poppleton and *Mr. Wakeley*, for the plaintiff.

Mr. Baldwin, for the defendant.

DILLON, *Circuit Judge.*—The land in question is embraced in the patent to the plaintiff, introduced in evidence, dated February 23, 1871, and this gives the plaintiff the legal title thereto, unless the same was land which had been sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim may have attached at the time the line of the plaintiff's road was definitely fixed.

The defendant claims that the land was excepted out of the grant made by the act of July 1, 1862, because before and at the time the line of the plaintiff's road was definitely fixed, there was a homestead claim thereto in favor of one Peter Hugus.

If you find, from the evidence, that Peter Hugus never saw this land, never made any improvements thereon, and never intended to make any, or to comply with the provisions of the homestead act as to settlement, occupation, and improvement of it, and never did anything except to file an application for an entry, and that he afterwards relinquished all right to the plaintiff, then we instruct you, as a matter of law, that no homestead claim attached to the land in favor of Hugus, and that the land would be embraced in the grant to the plaintiff, made by the said act of July 1, 1862, and conveyed by the patent to the plaintiff, which has been introduced in evidence.

DUNDY, J., concurred.

NOTE.—The jury found for the plaintiff, and the court rendered judgment upon the verdict and signed a bill of exceptions.

For construction of congressional railroad land grant: *Shulenburg* v. *Harriman*, *post*.

MORTON *v.* ROOT.

1. Equity has jurisdiction to remove a *cloud upon the title* to real estate where there is no adequate remedy at law.
2. A *sale under an execution* issued upon a judgment in which the land sold had not been attached, and where there was no service upon the defendant except by publication, is void.
3. In the *description of a tract* of land, an omission to state the course in one call, held to be supplied and rendered certain by the remainder of the description.

(*Before* DILLON and DUNDY, JJ.)

Jurisdiction.—Cloud Upon Title.—Defective Description in Deed.

THIS is a bill in equity to settle the title to certain real estate. The plaintiff in the bill alleges title in himself, derived as follows:—

1. On the 27th of June, 1865, he sued Pierce in attachment in the district court of the then territory of Nebraska, for Douglas county, the writ of attachment issuing and being levied on the premises in question.

2. At the October term, 1865, judgment was entered, and also an order to sell the said lands and premises for the satisfaction of the said judgment.

3. On the 16th of May, 1868, an order of sale was issued commanding the sheriff to sell the said lands.

4. In pursuance thereof he, on the 29th of June, 1868, sold the premises to the plaintiff.

5. At the July term, 1868, the sale was confirmed by the court.

6. On the 15th day of April, 1869, the sheriff made the deed to the plaintiff.

To show an adverse claim of the defendant the bill alleges that one Glass sued Pierce in attachment; that the writ was levied on property other than that here in question, and not upon the same; that Pierce was not served therein and did not appear thereto; that after the attached property was exhausted, a general execution was issued and the premises in question sold to Glass, who conveyed to the defendant.

On the 2d of July, 1866, a deed, dated December 10, 1864, from Glass to Root, of said premises, was put upon the records of Douglas county. The defendant answers these allegations, saying that he believes them to be true, but the decree was void because it described no premises.

To support the equity jurisdiction, the plaintiff alleges that the defendant is not in possession of the premises. This the defendant denies, and alleges that at the time when

this bill was filed he was, and ever since has been, and now is, in the actual possession, under the deed from Glass, dated and recorded as above stated.

The answer puts in issue the validity of the plaintiff's alleged title. The cause was submitted to the court upon proofs taken by the respective parties.

J. M. Woolworth, for the complainant.

B. E. B. Kennedy, for the defendant.

DILLON, *Circuit Judge.*—The first question to be settled is the jurisdiction of the court. This is conceded in the arguments to depend upon the fact whether the defendant was at the time the suit was commenced in actual possession. If in possession, no reason is stated in the bill why the respective rights of the parties could not be determined in ejectment. The bill in this case was filed August 27, 1870. We find, upon a careful reading of the evidence, that no fences or permanent improvements of any kind have ever been made upon the premises; the acre and a half of potatoes were raised in 1871, and the weight of the evidence shows that the clearing off of the small quantity of land was in the fall of 1870, which would be after suit was commenced. Upon the proofs in this cause, the plaintiff could not have established possession in the defendant at the time this suit was brought; and the court has jurisdiction to determine the respective rights of the parties.

Both parties claim title under judicial sales against Pierce. The sale under which the defendant derives his right was void for the want of a valid judgment and execution. Jurisdiction over the person or property is absolutely essential to a valid judgment, and as the property here in question was not attached, and as the judgment against Pierce was rendered upon constructive service by publica-

tion, there was no authority whatever to levy upon and sell this land.

This point is clear, and has not been contested by defendant's counsel in argument, but he has relied on the insufficiency or weakness of the plaintiff's title. We proceed briefly to notice his objections to this title.

It is urged that the court which rendered the plaintiff's judgment (under which judgment the plaintiff claims title), had no jurisdiction of the land in question. Although a portion of the papers in that action have been lost, yet the entries on the appearance docket, the order of sale, the return endorsed thereon, the appraisement, the notice of sale, the execution, the sheriff's deed to the plaintiff, all of which are produced, show that this objection is without foundation in fact.

It is also objected that the plaintiff's deed from the sheriff is void, because it and the precedent proceedings which it follows does not *describe the land* with sufficient certainty.

The description is as follows: "Beginning at the north-west corner of section 28, thence south eight chains and five links, thence south eighty-five degrees, twenty chains and ten links, thence north nine chains and seventy links, west twenty chains, to the place of beginning, in township 15, range 13, east of the sixth P. M."

The only defect pointed out is the omission of the word *east* in the second call in the description. But the testimony of the two surveyors examined as witnesses satifactorily shows that this omission is easily supplied by the data afforded by the description as a whole. The only uncertainty is whether the second course is eighty-five degrees east or west. As the last course is "*west* to the place of beginning," it is obvious that the course on the corresponding line on the south must be east. The testimony of surveyor Wiltse puts this in a clear light. He says "the description is defective in this, that in the second course from the place

of beginning the letter 'E' is omitted, running east. To determine whether it is east or west, I return to the place of beginning and reverse the courses and distances, until I arrive at the corner upon which this defective course must close, and I find that to close the survey, or retrace the boundary, the course must be south eighty-five degrees, east twenty chains and ten links." And to same effect is the evidence of George Smith, the only other surveyor examined to the point. The description is just as certain as if the word *east* had been inserted. The result is that the plaintiff is clearly the owner of the land in question, and is entitled to the relief prayed, which is to remove the cloud upon his title, and not for possession.

DUNDY, J., concurs.

DECREE ACCORDINGLY.

NOTE.—As to jurisdiction: *Morton* v. *Smith*, *ante*.

As to right to relief to remove cloud upon title to land: *Bunce* v. *Gallagher*, 5 Blatchf. C. C. 487; *Craft* v. *Merrill*, 14 N. Y. 456.

WILLIAM S. T. MORTON *v.* GEORGE R. SMITH.

1. A levy upon real estate which is not sold for want of bidders does not render a subsequent sale of other land, on another execution, void.
2. Where a judgment is rendered upon service by publication only, a sale of land not attached, upon a general execution issued upon such judgment, is void.
3. Under the statutes of Nebraska in force in 1859, as to the acknowledgment and proof of conveyances of land, executed in another state, it was indispensable when these were not acknowledged before a commissioner appointed by the legal authorities of Nebraska, that the certifying officer should certify that the execution and acknowledgment is according to the laws of the state where the instrument is executed; and the record of a deed where this requirement is omitted does not operate as constructive notice of its existence.

(*Before* DILLON and DUNDY, JJ.)

Jurisdiction.—Execution Sale.—Defective Acknowledgments.—Constructive Notice.—Local Statute Construed.

BILL in Chancery to quiet title to a certain tract of land near Omaha, containing twelve and sixty-seven-hundredths acres, and for partition. Neither party is in actual possession. Both parties claim under one Roswell G. Pierce.

The plaintiff's title is derived under an execution sale made in November, 1869, upon a judgment in his favor against Pierce, rendered at the June term, 1860.

The defendant claims title in two ways: First, under an execution sale upon a judgment rendered by publication in an attachment suit by one Glass against Pierce; second, by conveyances from Pierce, independent of the judicial sale. These sources of title are referred to in the opinion.

J. M. Woolworth, for the plaintiff.

C. S. Chase, for the defendant.

DILLON, *Circuit Judge.*—1. The plaintiff's judgment against Pierce, and his execution sale thereunder, which was confirmed by the court, and followed by a sheriff's deed, gives him a title unless a better title is shown by the defendant.

The fact that a prior execution had issued upon the plaintiff's judgment and been levied upon other land which was not sold for want of bidders, does not amount to a satisfaction of that judgment and render the subsequent execution sale of the land in dispute void.

2. As to defendant's title. Prior to plaintiff's suit against Pierce, one Glass (January 10, 1860) commenced suit against Pierce by attachment, and levied the writ of attachment upon the undivided three-fourths of the land in controversy. Pierce was not served except by publication. Judgment was rendered upon constructive service, and the

premises attached were ordered to be sold, and were sold, and the title under this sale is in the defendant. This sale is valid, and gives the defendant the prior and better title to the undivided three-fourths. After this sale, without any further service upon, or proceedings against, Pierce, the judgment creditor (Glass) caused a general execution to issue against Pierce, and this was levied upon the remaining undivided one-fourth, which was sold, and under this sale the defendant claims the title thereto. But there having been no attachment of this undivided quarter interest prior to the judgment, nor at any time, and no service upon Pierce except by publicaiion, there was no authority to issue a general execution upon the judgment, and levy upon and sell property which had not been attached. That execution and sale were void.

But the defendant also claims title to this one-fourth in this wise: On the 12th of April, 1859, Pierce made a deed to one Ralph Marsh, which was filed for record before any of the judicial proceedings against Pierce had been commenced, and defendant claims by mesne conveyances under the deed to Marsh.

It is not denied that if this deed to Marsh conveys the same land and was duly acknowledged and recorded, that it defeats the plaintiff's title, for in such case Pierce had no interest in the land at the date of plaintiff's judgment, and execution sale.

No claim has been made in argument by the plaintiff's counsel that the deed insufficiently described the land in controversy, but he rests his case upon the proposition that the deed from Pierce to Marsh was not acknowledged and certified so as to be entitled to be recorded, and therefore the record of it was not constructive notice of its existence. There is no evidence whatever of actual notice to the plaintiff of this deed.

The deed from Pierce to Marsh was executed April 12, 1859, in the state of New York. It was acknowledged on that day before a commissioner of deeds in the city of New York, appointed by the authority of that state.

A clerk of a court of record of the city or county of New York certifies under his seal that the commissioner is such officer as he represents himself to be, that he is well acquainted with his handwriting, and that his signature is genuine, as required by section 5 of the act of January 26, 1856 (Laws of Nebraska, second session, 1856, p. 80), but he entirely omits to certify, as required by that section, "that the deed is executed and acknowledged according to the laws" of the state of New York. This is indisputably an essential requirement of the law then in force.

Another portion of the act requires this certificate to be recorded with the deed (secs. 13, 14), and a subsequent section provides that deeds "shall not be deemed lawfully recorded unless they have previously been acknowledged or proved in the manner herein prescribed" (sec. 17). By section 16, "all deeds which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register for record, and not before, as to all creditors and subsequent purchasers in good faith, without notice; and all such deeds shall be adjudged *void* as to all such creditors and subsequent purchasers, without notice, whose deeds shall be first recorded."

This deed not having been certified as required by law, the objection of the plaintiff to the admission of the record thereof as evidence was well taken, and it is void as against the plaintiff, a creditor of the grantor, and a subsequent purchaser under a judgment against him.

The result is that the plaintiff owns an undivided one-fourth, and the defendant an undivided three-fourths of the

land in controversy, and a decree will be entered accordingly. Each party to pay his own costs.

DUNDY, J., concurs.

DECREE AS ABOVE.

NOTE.—As to the sufficiency of the certificate of acknowledgment: *Harrington* v. *Fish*, 10 Mich. 419; *Lyon* v. *Kain*, 36 Ill. 362; *Wright* v. *Taylor*, *ante*, p. 23; *Randall* v. *Kreiger*, *post*.

IN RE CROSS.

1. Under the statutes of Nebraska the husband and wife may make a valid mortgage of the homestead property.
2. An *express* waiver of the homestead right is not essential to the validity of such a mortgage.

(*Before* DILLON, *Circuit Judge.*)

Homestead Exemption.—Mortgage.— Waiver.

THIS is a petition under the second section of the bankrupt act, to review an order of the district court refusing to subject to sale lots 1 and 2 in block 12, in Tecumseh, claimed by the bankrupt as a homestead.

The adversary parties in this proceeding are the bankrupt and his wife on the one hand, and Dutcher & Co. mortgage creditors of the bankrupt, holding a mortgage on the homestead property.

The facts are briefly these: Prior to June, 1870, the bankrupt became indebted to Dutcher & Co., and in June, 1870, he erected a house on the two town lots herein claimed as a homestead, and removed there with his family, where he has ever since resided. On the 22d day of October, 1870, the bankrupt and his wife executed a mortgage upon two hundred and forty acres of land, and upon the

two lots occupied by them as a homestead, to secure Dutcher & Co. the sum of $2,000, evidenced by the promissory note of the husband of that date. This mortgage is duly signed and acknowledged by Cross and his wife, and is in proper form, but it contains no express waiver or relinquishment of the homestead right or exemption.

Cross having afterward been adjudicated a bankrupt, and the mortgage not having been paid, the mortgagees, on the 19th day of April, 1872, filed their petition in the bankruptcy court, setting forth their mortgage and praying that the assignee in bankruptcy might be ordered to sell the mortgaged property free of all incumbrances, and that the lien of the mortgage be transferred to the proceeds.

That court found that there was due upon the mortgage $2,000, with interest from October 22, 1870, and on September 16, 1872, made an order to sell the two hundred and forty acres of land embraced in the mortgage. It was further "ordered by the court that lots 1 and 2 in block 12, Tecumseh, *be not sold for the reason that the same are occupied by the said bankrupt and his family as a homestead.*" To this last order the mortgagees objected, and to have its correctness determined bring the case here for review.

A. J. Poppleton and *Wm. O. Bartholomew*, for the petitioners for revision.

E. W. and *V. D. Metcalf*, and *Isaac N. Shambaugh*, for the bankrupt and his wife.

Dillon, *Circuit Judge.*—There is substantially but one question in this case, and that is whether the mortgage executed by the husband and wife upon the homestead is valid and created a lien thereon in favor of the mortgagees. In the chapter of the state statutes relating to "Executions against the property of the judgment debtor," occur certain

provisions as to "Homestead and other Exemptions." Section 525 is as follows:—

"A homestead, etc., owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale upon execution, or any other process, issuing out of any court within this state, so long as the same shall be owned and occupied by the debtor as such homestead."

By the act of 1870, "Taxes, clerks', laborers', and mechanics' wages and money collected for another by an attorney at law" are excepted from the benefit of the exemption.

There is no provision in the statute prohibiting the alienation, sale, or mortgage of the homestead, or of any of the other property exempted by the statute from judicial sale. Nor is there any provision respecting the mode of conveying the homestead, but there are general provisions relating to the manner of conveying real property, in conformity with which the mortgage here in question was executed.

Under these circumstances I perceive no difficulty in the question here presented.

The legal title to the lots occupied as the homestead being in the husband, he and his wife, by joining in an absolute conveyance thereof, might, undoubtedly, make to the purchaser a perfect title. There being no restriction upon the right of disposition, I think it equally clear that they could in this mode make a valid mortgage upon the homestead. If so, then such a mortgage can and should be enforced.

The provisions of the statute above mentioned, respecting the exemption of the homestead from sale upon execution or other judicial process, plainly refer to executions or process upon general judgments, not to decrees upon foreclosure of a valid mortgage upon the homestead. The language exempting the homestead from judicial sale can no

more be construed to prohibit the owner from making a mortgage upon it than from making a sale of it. Similar language is employed in section 530 as to the personal property thereby exempted from judicial seizure and sale, and yet it could scarcely be contended that a valid mortgage might not be made by the owner of such property.

The exemption in both cases is for the benefit of the debtor and his family. It may be waived. And when the husband and his wife unite in the execution of a mortgage upon the homestead for a valuable consideration received by them or either of them, the right to the exemption is thereby waived in favor of the mortgagee.

I perceive nothing in the legislation of the state which prescribes a particular method of conveying the homestead or requiring an *express* waiver of the homestead right. In Iowa the statute in terms provides that no sale or conveyance of the homestead shall be of any validity, unless both husband and wife concur in and sign the conveyance, and yet it is held that no express waiver of the homestead right is necessary to a valid deed or mortgage.

REVERSED.

NOTE.—The cases on the subject of the Homestead Exemption down to 1862 will be found collected in the American Law Register, Vol. 1, new series, pp. 641, 705. See also *Cox* v. *Wilder*, *ante*, p. 45, and cases cited in note on p. 50; *Bartholomew* v. *West*, *ante*; *In re Tertelling*, *post*.

An express relinquishment of the homestead right held not necessary, where it was not required by the statute. *Babcock* v. *Hoey*, 11 Iowa, 375; *Pfeiffer* v. *Rhein*, 13 Cal. 643.

But formal release or waiver is in some states required: *Kitchell* v. *Burgwin*, 21 Ill. 40; explained 23 Ill. 536; 26 Ill. 107, 150; 1 Am. Law Reg. (N. S.) 706, note.

REPORTS

OF

CASES DETERMINED

IN THE

Circuit Court of the United States,

FOR THE

DISTRICT OF KANSAS.

CLAFLIN *v.* STEINBERG.

1. One of the judges of the circuit court will not, against the objection of the adverse party, hear *in vacation* a motion to discharge property attached pursuant to the local laws of the state, although the motion is one which may be properly made and heard by the court *in term.*
2. The provision of the state attachment act, that such a motion may be made in vacation before, and decided by, the *state* judge, in whose court the action is pending, has, although the attachment act be adopted by rule in the federal court, no application to the judges of the latter tribunal.

(*Before* DILLON, *Circuit Judge, at Chambers.*)

Practice.—Power of Judge in Vacation.—Discharging Attached Property.

ON motion to discharge property attached. The plaintiff, a citizen of New York, brought an action in the circuit court of the United States for the district of Kansas, against the defendant, a citizen of that state. The action was com-

menced by attachment, and property of the defendant was seized under the writ, and is in the custody of the marshal. By rule, the court has adopted the statutes of Kansas in relation to practice and proceedings at law when not inconsistent with the constitution and laws of the United States, including the attachment act of that state. By that act it is made a ground of attachment that the debt for which the suit is brought was *fraudulently created or incurred;* and the plaintiff made an affidavit to this effect in this case. It is also provided in this act that the defendant may move to discharge the attached property; and the practice in the state courts under this statute is to receive affidavits in support of such a motion, and counter-affidavits in opposition to it. In other words, the truth of the ground for the attachment is, in this manner, inquired into, and if found not to be true the property attached is ordered to be discharged: Gen. St. of Kansas, 672, Secs. 228, 229. By a statute of Kansas relating to the district courts of the state it is provided, among other powers of the district judges, that they may *in vacation* hear motions to dissolve injunctions, and to discharge attached property: *Ib.* 304, sec. 2.

In the present case, commenced, as above stated, by attachment, the defendant gave to the plaintiff notice that he would move before the circuit judge at his chambers in the city of Davenport, to discharge the attached property, and the motion was, by consent, postponed, to be heard before the circuit judge at his chambers in the city of St. Louis, on October 5, 1871. Accordingly, on that day the parties appeared; the defendant's counsel producing affidavits to negative the truth of the cause alleged for the attachment. The plaintiff's counsel produced counter-affidavits, and made the point that the motion could not be heard at chambers.

Fenlon & Stillings, for the motion.

Jno. M. Krum, *Henry M. Herman*, and *Hiram Griswold*, opposed.

Dillon, *Circuit Judge.*—The federal circuit court for Kansas has adopted the attachment act of the state, and under it the writ of attachment was issued. That act provides that a motion may be made to discharge the attached property, and it is admitted to be the settled practice under it that such a motion may be grounded upon a denial of the truth of the cause stated for the attachment, and may be supported and opposed by affidavits. Accordingly, I have no doubt that the *court* in term may entertain and hear this motion: *Garden City Co.* v. *Smith*, 1 Dillon C. C. 305.

But may it be heard and decided by one of the judges of the court *in vacation?* Without going at large into a discussion of the question of power, it is my judgment that I ought to decline to act upon the motion, even if I have the authority to hear it at chambers. The circuit court does not derive its jurisdiction, nor its judges their powers, from the state legislation; and the statute of the state which authorizes a *state* judge to hear in vacation a motion to discharge attached property, has no application, and can have none, to the federal court or its judges. There is no act of Congress giving the federal judges this power, and there has been no rule adopted authorizing such a practice. Whether it would be competent to adopt such a rule I need not inquire. The state court is held by a single judge, who resides near the place where the suit is pending, and, for convenience, the legislature has authorized him to hear in vacation a matter which the same judge would otherwise hear in term. But there are three judges entitled to seats in the federal circuit court, two of them living hundreds of miles distant from the district. If I must hear this motion, as a matter of right so might either of the other judges. Such a practice would be inconvenient and expensive; but

the chief objection to it is, that it would deprive the plaintiff of the right to a decision of the question by the *court*, which sits in the state, and which the law contemplates shall, whenever practicable, be held by two judges, and not by one.

This may be illustrated by the practice established by the United States statutes when there is a difference of opinion between the federal judges. In such an event, the legal questions involved must be certified to the supreme court; for the opinion of neither judge can then prevail. But the practice contended for in this case involves a practical disregard of that plain requirement of the federal statute, and the assumption of authority not intended to be vested in one judge of the court without respect to the opinion of his associate.

MOTION DENIED.

MARKSON, Assignee, v. HOBSON, *et al.*

A banker who allows his drafts to go to protest, suspends payment and closes his doors against depositors, proclaims to the world that he is insolvent, and a creditor who, with knowledge of these facts, receives payment of his debt secures an illegal preference, and is liable to the assignee for the amount thus received.

(*Before* DILLON and DELAHAY, JJ.)

Bankrupt Act.—Suspension of Payment by a Bank.—Illegal Preference.

THE plaintiff, as assignee in bankruptcy of A. Thomas & Co. recovered at this term against the defendants, in six actions, verdicts for the sums severally received by them as creditors of A. Thomas & Co. A motion was made by the

defendants for a new trial, in overruling which the following opinion was delivered.

Mr. Wheat, Mr. Britton, Mr. Royce, and *Mr. Hoag,* for the assignee.

Mr. Wagstaff, Mr. Simpson, Mr. Williams, and *Mr. Pratt,* for the defendants.

DILLON, *Circuit Judge.*—These are actions by the assignee under section 35, of the bankrupt act, to recover from the defendants moneys severally received by them on the 16th day of November, 1869, in payment for debts due them from the late firm of A. Thomas & Co. The firm of A. Thomas & Co. were private bankers, doing business at Paola, in this state. About the 1st day of November, 1869, a "run" was made upon their bank, and on the 2d day of November they were obliged to close their doors, which were not afterwards opened. In the month of December following, proceedings in bankruptcy were instituted against them. The defendants, all of whom resided in Paola, were creditors of Thomas & Co. some of them holding protested drafts, and others being depositors. All of the defendants as witnesses admitted on the stand that they knew of the suspension of Thomas & Co. and the closing of their doors at and prior to the time they received payment. The immediate circumstances surrounding the receipt of payment by the defendants are these: After the doors of the bank were closed, Thomas & Co. who held considerable real estate, gave out that they would be able to resume in a few days, and that to this end they were negotiating for, and were about to secure, by mortgaging their real estate, a large sum of money. On the 16th day of November the negotiations for a loan to them of $20,000 were closed, the business being done in the office of Mr. Simp-

son, an attorney. This loan was secured by mortgage on a business block in Paola, then not quite finished. Of the above sum, about $8,000 were deposited in the hands of a trustee to provide for the completion of the building, and $7,700 deposited on the same day by or for Thomas & Co. not in their own bank, but in the Miami Savings Bank, in the same place. What was done with the rest of the money borrowed by Thomas & Co. does not clearly appear, but they never resumed business, nor did they attempt to do so. As stated, the borrowing was completed on the 16th day of November, in Mr. Simpson's office, late in the day, and the money deposited in the savings bank. Most of the defendants had been pressing Thomas & Co. for payment. When the transaction for the loan was consummated, Thomas & Co. being present, it was agreed that the $7,700 should be deposited in the savings bank, and the checks were then and there drawn by Thomas & Co. on the savings bank in favor of various creditors, including the defendants, for the amount of the $7,700. To recover payment received on these checks, the present actions were brought by the assignee. One of the checks so drawn was made payable to Mr. Simpson, the attorney in whose office the papers relating to the loan were executed, and was for the sum of $3,450. This was done after dark, on the 16th of November, and out of the proceeds of this check Mr. Simpson, being authorized and directed to do so by Thomas & Co., paid the debts of three of the defendants. Checks for the residue of the $7,700 were delivered to the other defendants, and to one or two other creditors of Thomas & Co. on the next day, and the money received thereon. All the defendants knew when payment was received by them that Thomas & Co. had suspended, and that their bank was then closed, and the circumstances are such that those who received payment through Mr. Simpson not only knew this, but must

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have known that Thomas & Co. had no intention to resume business. The defendants constituted and were known to constitute but a small portion of the creditors. Mr. Simpson was authorized to act for two of the defendants in thus receiving payment for them, and he assumed to act as the friend and attorney for the other, although without any express and specific authority in this instance, but his act was ratified and the money received. Of course the defendants thus receiving payment through Mr. Simpson are affected with knowledge of the facts known to him respecting the manner in which the money was obtained and disposed of by Thomas & Co.

A bank suspending payment and closing its doors against its creditors makes to the world a proclamation of its insolvency. The bank was thus suspended and closed when each of the defendants received payment on the checks drawn on the savings bank, and this fact was personally known to each of the defendants. The payments were not received in the usual course, but in checks drawn by bankers whose doors were closed upon another bank in the same place. The jury have properly found that payments thus made and received are in violation of the bankrupt law, because intended to give, and, if sustained, would give, a preference. The evidence fully convinces us that Thomas & Co. did not intend to resume business, and that they selected the defendants and a few others from the mass of their creditors to favor or prefer them by paying them hastily and secretly, in full, out of the $20,000 loan, and that the defendants, in receiving their pay, must have known, and certainly had reasonable cause to believe, that they were thereby securing an advantage over the other creditors. If payments received under such circumstances could be held against the assignee, the bankrupt act ought to be repealed, since its practical operation and effect would

be to give to resident and favored creditors the very preference which the act in so many of its provisions professes to invalidate. The act disarms the vigilance of creditors generally by declaring that no vigilance can be rewarded by a preference, if obtained contrary to its provisions within four months prior to filing of the petition in bankruptcy. It undertakes to disable creditors from procuring preferences within that period by attachment, mortgage, or confession of judgment. What preference can be more unjust than that which would result from this prohibition to creditors to run the race of vigilance, and then to sustain payments made by a known insolvent to local creditors from importunity or personal considerations?

The bankrupt act must be so administered as to suppress illegal preferences, or it necessarily operates as a fraud upon the rights of the mass of creditors, who in good faith refrain from seeking advantages contrary to its provisions and policy. If preferences cannot in general be effectually suppressed, because of the sympathy of jurors in favor of the creditor who has simply been vigilant, or fortunate, in securing a just debt, and their disinclination to render a verdict which, while it makes such a creditor pay back the amount, also disentitles him to prove his debt in bankruptcy or receive dividends, the professional and the popular voice will soon demand the repeal of the law, so as to allow, as before its enactment, creditors to strive for and hold if fairly obtained, the fruits of their vigilance. I have found jurors in general somewhat disinclined to hold preferences to be such, and I find it necessary to prevent the bankrupt law from being evaded, to state with clearness to juries, as I did in these cases, the purpose of the law, and that no prejudice against it, or sympathy with defendants, should prevent them from fairly and impartially applying its principles and provisions. Their verdicts in the cases under considera-

tion were not only supported by the evidence, but if they had been otherwise, I should have regarded it as my duty to have set them aside. The motion for a new trial is in each case denied.

DELAHAY, J., concurs.

JUDGMENT FOR THE PLAINTIFF.

NOTE.—See *Borland v Manlove*, *post*.

E. A. PARROTT *v.* THE CITY OF LAWRENCE, THE LAWRENCE BRIDGE COMPANY, J. C. WILSON, *et. al.*

1. The legislature, in the charter of the Lawrence Bridge Company, gave it "the *exclusive* right and privilege of building and maintaining a *bridge* across the Kansas river at the city of Lawrence, for the period of twenty-one years," but prior to the time of the passage of such charter the legislature had given to one Baldwin the exclusive right to maintain a *ferry* at said city for the term of fifteen years, which franchise, at the time the bridge charter was passed, had over twelve years to run. Subsequently Baldwin ceased to operate his ferry, but the state authorities, under an act of the legislature respecting public ferries, granted a license to keep a ferry at the city of Lawrence within the limits and period covered by the bridge company's charter: *Held*, that the establishment of a ferry was not an infringement of the charter of the bridge company.
2. Principles of *construction* of legislative grants conferring *exclusive privileges* stated.
3. The particular mode of crossing the stream employed by the defendants, and described in the opinion of the court, was held to be a ferry, and not a bridge.

(*Before* DILLON and DELAHAY, JJ.)

Bridge and Ferry Franchises.—Principles of Construction of Legislative Grants Conferring Exclusive Privileges.

THIS cause is now before the court on the motion of the defendants to dissolve the temporary injunction which was granted at chambers without resistance, restraining the de-

fendants, the Messrs. Wilson, from operating the ferry hereinafter described. The plaintiff, a citizen of Ohio, is one of the principal stockholders in the Lawrence Bridge Company, and, to give the court jurisdiction, states in his bill that the said bridge company and its officers have refused to proceed in the courts of the state to obtain redress for the grievances complained of by him. He makes defendants, the bridge company, the city of Lawrence, and the Messrs. Wilson, the latter of whom are operating the ferry which is the subject matter of complaint.

The question on which the right to the injunction depends is whether the ferry, which will presently be described, infringes the rights of the stockholders and owners of the Lawrence Bridge Company under the charter of that company, granted by the legislative assembly of the territory of Kansas, and subsequently recognized by the legislature of the state of Kansas.

The *enactments* relating to the Lawrence Bridge Company so far as material, are, in substance, these: On the 15th day of February, 1857, the legislative assembly of the territory of Kansas incorporated the Lawrence Bridge Company, granting to the corporators and their assigns "The *exclusive* right and privilege of building and maintaining a *bridge* across the Kansas (or Kaw) river at the city of Lawrence for the period of twenty-one years," &c., the capital stock to be $100,000 [afterwards $375,000], to be divided into shares of $100 each — with power to the company "to establish and collect tolls for crossing the said bridge;" said bridge to be commenced within three years, &c. On the 9th of February, 1858, the legislature re-enacted the charter in the same language as that above quoted; and on the 3d day of February, 1859, amended the charter as to the rates of toll on the bridge, and on the 3d day of March, 1863, gave to the company eighteen months from that date within which to

"complete said bridge in a good and substantial manner, so as to facilitate travel over the same."

The bill and affidavits show that the bridge was completed according to the requirement of the legislature, and has been used, and tolls charged, ever since.

Prior to the incorporation of the Lawrence Bridge Company, the legislative assembly of the territory of Kansas had, in 1855 (Stats. of Kansas Territory, 1855, p. 773), granted to one John Baldwin "the *exclusive* right to establish a public *ferry* within two miles of the said town of Lawrence for the term of *fifteen* years from and after the passage of this act" — the county authorities being empowered to fix the rates. The answer of the defendants other than the company alleges that Baldwin established and kept this ferry in the immediate vicinity of the place where the bridge is located for some time after the erection of the bridge, when, for reasons unknown to the defendants, he ceased to operate the ferry.

By the laws of Kansas the county commissioners have the power to grant ferry licenses, and from the pleadings and affidavits, it appears that in January, 1871, one Darling obtained, from the board of county commissioners of the county in which the city of Lawrence is situated, a license to keep a ferry at the said city for the term of one year. He built a flat-bottomed ferry boat, and operated it himself under his license until April, 1871, when the city of Lawrence purchased the flat-boat and other ferry fixtures for the sum of $3,000, paying therefor out of the funds of the city; after which the Wilsons (defendants) continued to operate the ferry, they owning the engine by which the boat was moved and the city the boat. At first the arrangement between the city and the Wilsons was that the ferry should be run free, the city to compensate them for their labor and the use of their engine; and afterwards, December 4, 1871,

another arrangement was made, by which the city agreed to let the Wilsons have the use of the ferry boat, ropes, and fixtures, and was to charge no tolls except five cents on each team that crossed, which is much less than the rates of toll charged by the bridge company. On the 6th day of January, 1872, the county commissioners granted to the defendant, Wilson, "the right to keep and run a ferry on the Kansas river at the city of Lawrence for one year."

According to the bill, answer, and affidavits, it appears that the ferry boat, or, as the bill styles it, the *floating bridge*, is operated in this way: Two ropes, or cables, are thrown across the river, fastened on each side, one of which is an endless chain. A rope is fastened to the upper side of the boat, or "floating bridge," and this rope glides upon the upper cable by means of a pulley attached to the other end of the rope, said pulley passing from side to side of the river with the boat, the motive power moving the boat back and forth across the stream being a stationary steam engine located on the north bank of the river. The boat itself is an ordinary flat-bottomed boat.

Thacher & Banks, and *N. T. Stephens*, for the complainant.

Wilson Shannon, for the Messrs. Wilson and the city of Lawrence.

Dillon, *Circuit Judge.*—The grant to the bridge company by its charter is "the *exclusive* right and privilege of building and maintaining *a bridge* across the Kansas river at the city of Lawrence," and "to establish and collect tolls for *crossing said bridge.*" If this right has not been invaded, the complainant is not entitled to an injunction against the running of the ferry. I say the *ferry*, for, in my judgment, it is clear that the means used to cross the river by the defendant, Wilson — viz: a flat-bottomed boat, connected with ca-

bles spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank — is a ferry, as distinguished from a bridge, both under the legislation of the state and according to the usual meaning of the word.

The passage over streams is generally effected in one of two ways, viz: by bridges, which, as commonly constructed for the use of travelers and teams, are immovable structures or extensions of the highways over and across the water; and by boats, which are movable and propelled by steam-power, horse-power, the action of the current, or similar agencies. When the passage is by the latter mode it is called *ferrying*, which implies a boat that moves back and forth across the stream, from bank to bank. The legislation of Kansas everywhere recognizes this distinction between bridges and ferries. In the statutes of 1855 there are provisions for building bridges (chap. 18), and also for regulating ferries (chap. 71). At the first session of the legislature, in 1855, there were a great many special acts, some authorizing certain persons to build toll bridges, and others to establish and maintain ferries. Among these numerous acts was one giving to John Baldwin the exclusive right to keep a public ferry across the Kansas river at the town of Lawrence for the period of fifteen years. Two years afterwards the legislature incorporated the Lawrence Bridge Company, giving it the exclusive right to build and maintain a bridge across the river at the same place. Did this invade the franchise which had been granted to Baldwin? Clearly not, for the two grants are different; the one was to keep a ferry and collect tolls or ferriage for crossing the stream by this mode — the other was to erect and maintain a bridge, &c., "to collect tolls for crossing the same." So that during the period for which Baldwin's ferry charter was to run, there were two modes of crossing the river at

Lawrence expressly authorized—the one by means of Baldwin's ferry, the other by means of the bridge of the Lawrence Bridge Company.

The contract of the legislature with the bridge company must be protected from subsequent invasion. But what was that contract? It was simply an exclusive right to build a bridge and to "collect tolls for crossing the same." It is argued that the contract with the bridge company was that the travel of a certain district, to-wit: those passing the river at Lawrence should pass over this bridge and pay tolls therefor. But it is clear that such was not the contract: 1st, because it is not so expressed, or fairly to be implied from the language used; and, 2d, because the existence of the Baldwin ferry charter, which must be presumed to have been in the mind of the legislature when it passed the bridge charter, and which, by its terms, would continue in force many years after the period fixed for the completion of the bridge, shows that the legislature did not intend to make a contract with the bridge company to the effect that all persons and property crossing at Lawrence should pass over the bridge.

When we consider that legislative grants creating monopolies, while they are not to be cut down by hostile or strained constructions, are nevertheless not to be enlarged beyond the fair meaning of the language used (*Binghamton Bridge Case*, 3 Wall. 74), this conclusion seems, to my mind, so clear as not to admit of fair doubt.

It has been settled by adjudication that the exclusive right to a toll bridge is not infringed by the erection of an ordinary railroad bridge within the limits over which the exclusive right extended (*Mohawk Bridge Company* v. *Railroad Company*, 6 Paige, 564; *Bridge Proprietors* v. *Hoboken Co.* 1 Wall. 116, 150, and cases cited); and the reasoning upon which this conclusion rests shows that where the charter of

the bridge company is silent upon the subject, its exclusive right would not be invaded by the establishment, under legislative authority, of a public ferry, although this would have the incidental effect to injure the value of the franchise of the bridge company. That this is the opinion of the presiding justice of this court is plain from an expression to that effect, by way of argument, in his opinion in the *Hoboboken Bridge Case* (1 Wall. 116, 149). In that case the legislature of New Jersey, in 1790, authorized the making of a contract with certain persons for the building of a bridge over the Hackensack river, and by the same statute enacted that it should not be lawful for any person to erect "any *other bridge* over or across the said river for ninety-nine years;" and it was held that the railroad bridge subsequently authorized, which was so constructed as that persons or property could not pass over it except in railway cars, did not impair the legal rights of the bridge proprietors. Mr. Justice MILLER, in discussing the question as to what was the meaning of the act of 1790 and the contract with the persons who built the bridge, says: "There is no doubt that it was the intention of those who framed those two documents to confer on the persons now represented by the plaintiffs some exclusive privileges for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by the defendants will infringe it. In the first place, it is not an exclusive right to transport passengers and property over the Hackensack and Passaic rivers, *for there is no prohibition of ferries*, nor is it pretended that *they* would violate the contract." (1 Wall. 149.)

In conclusion I may remark, that I have considered the very ingenious argument made by the complainant's counsel to show that the mode adopted by the defendants for transporting persons and property across the river is not a

ferry, but a flying bridge, or a floating bridge, and hence it is a violation of the franchise of the bridge company. But the single boat which is made to cross the river by steam-power is not, in my judgment, a bridge of any kind, and certainly not a bridge within the meaning of legislation of the state of Kansas on the subject of bridges and ferries. It is argued, and perhaps with correctness, that the city of Lawrence transcended her powers in purchasing boats and in assisting Wilson to maintain his ferry under his license from the county authorities. But if this be granted, it falls far short of showing that the complainant is entitled, in consequence, to an injunction to prevent Wilson from running his ferry under his license.

DELAHAY, J., concurs.

INJUNCTION DISSOLVED.

NOTE.—As to the powers of municipal corporations with respect to ferries, see Dillon on Municipal Corporations, secs. 31, 78, 79, and cases there cited.

In re TERTELLING.

1. The constitution of Kansas provides that " a homestead to the extent of one acre in an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempt from forced sale under any process of law." *Held*, that the *whole* house occupied as a home by the bankrupt debtor was exempt, though a portion of it may be used, and may have been constructed with a view to be used for a brewery.
2. Whether a block of stores or a brewery building upon the land, not part of the residence and not occupied by the family as a home, would be exempt, *quære?*
3. *Mortgagee of a homestead* may vote in the choice of an assignee in bankruptcy. [*Per* DELAHAY, J., note.]

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Homestead Exemption.—Constitution of Kansas Construed.—What Constitutes a Homestead.

Petition by the bankrupt, Tertelling, for a review of an order of the district court in relation to property claimed by him as a homestead under the constitution of Kansas. The register reported to the court the following facts:

"At the time of the commencement of proceedings in bankruptcy against said Tertelling, he was engaged in the business of manufacturing beer in Wyandotte, Kansas. He was the owner of a brewery, in which he carried on the business. He was also the owner of real estate there, described as lots one, two, three, four, five, six, and thirteen, in block seventy-one, in Wyandotte, an incorporated place, on which his brewery was situated — all of the lots being in the same enclosure, and constituting less than an acre of ground. He had been engaged in this business about three years. During all that time, previous to November or December, 1870, he, with his family, consisting of a wife and several children, had occupied a portion of the brewery building as their home. The portions so occupied by the family were the two north rooms in the first story and the second story. The remainder of the brewery building, to-wit, the south rooms in the first and second stories, the basement, sheds, vaults, and ice house, were used for the purpose of carrying on the brewery business, some portions of them occasionally for the storing of vegetables, but mainly in the business of brewing. There was also a stable on the premises used by him for keeping his horses, cows, &c. There was a small house on lot thirteen, which had been rented to other parties by him. In November or December, 1870, Tertelling, with his family, moved into the small house on lot thirteen. His object in moving was to enable him to put a new roof upon the brewery building, and he moved with the intention of returning after he should put

on the new roof. Having done so, he returned, and was living in the brewery when these proceedings were commenced."

The register found, as conclusions of law from the facts aforesaid, that "Tertelling is entitled to a homestead in the premises known as the brewery building—that is to say, in the two north rooms in both the first and second stories, and in the other portions of said lots one, two, three, four, five, and six, in block seventy-one, not covered and occupied with the other portion of said brewery building and the sheds, cellars, arched vaults, and ice house, connected therewith, but that the south rooms in both the first and second stories, the basement of the building, the cellars, arched vaults, and ice house, and said lot thirteen and the house thereon, are not a part of such homestead, and are not exempt from seizure or execution."

The report of the register was confirmed by the district court and an order entered accordingly, to which the bankrupt excepted, and to reverse which the present petition is brought.

Cobb & Bartlett, for the bankrupt.

Cook, Sharp, & Britton, for the assignee.

DILLON, *Circuit Judge.*—The bankrupt act exempts property to an amount not exceeding that allowed by state exemption laws in force in the year 1864 (sec. 14). The constitution of the state of Kansas in force in 1864, as well as at the present time, provides: "That a homestead to the extent of one acre within the limits of an incorporated town or city, *occupied as a residence* by the family of the owner, together with *all* the *improvements* on the same, shall be exempted from forced sale under any process of law." Art. 15, sec. 9. The correctness of the facts found by the register is not disputed, and that the bankrupt is entitled

to a homestead exemption in the brewery building, so called, is admitted. The question is whether the court below was right in *dividing the same building into two portions*, the one portion being considered a homestead, and exempt, and the remainder not a homestead, and therefore subject to execution and forced sale. The constitutional provision respecting the homestead exemption is exceedingly liberal to the debtor; but it may admit of some doubt whether it is just towards the creditor. The quantity of land exempted is limited, but there is no limitation on the value of the land exempted, or the value of the [homestead] improvements thereon. If the building is occupied as a residence by the family of the owner it is exempt, whatever its value. The building now in question was thus occupied, and it is all exempt, though a portion of it may have been devoted to other uses. We do not decide that in addition to the house occupied as a homestead and separate from it, the owner could erect upon the acre upon which his residence is situated a block of stores, or a brewery building (not occupied by the family as a home), and hold it as exempt. No such case is before us. We only hold that the *whole* house occupied as a home is exempt, though a portion of it may be used, and may have been constructed with a view to be used for other purposes. We have examined the cases referred to by counsel, arising under the homestead legislation of other states. These turn upon special statute provisions, and afford little aid in construing the constitutional exemption in this state. We are of opinion, upon the facts reported by the register, that the entire building is exempt from forced sale.

The order of the district court is reversed.

REVERSED.

NOTE.—Homestead exemption laws as impairing the obligation of contracts: *Gunn* v. *Barry*, 15 Wall. 610; *Martin* v. *Hughes*, 67 Nor. Car. 293; *Poe* v. *Hardie*, 65 *Ib.* 447.

May be exempt, though a portion of the building is occupied for business purposes: *Orr* v. *Shraft*, 22 Mich. 260. What use essential to constitute homestead: *Coolidge* v. *Wells*, 20 Mich. 79; *Gary* v. *Easterbrook*, 6 Cal. 457; *Rhodes* v. *McCormick*, 4 Iowa, 368; *Philleo* v. *Smalley*, 23 Texas, 498; 1 Am. Law Reg. (N. S.) 640 *et seq.* *Mortgagee of homestead may vote in the choice of an assignee in bankruptcy.* *In re Stillwell*, District Judge *Delahay* decided, after an examination of sections 13, 20, and 22 of the banksupt act, that "a creditor having a mortgage upon the homestead of the bankrupt has the right to prove his demand and vote on the choice of an assignee in bankruptcy. He denied the correctness of the broad statement of the rule in Bump on Bankruptcy (4th Ed. 123), "that a secured creditor cannot vote;" and he added that he was "unable to see how the fact that the mortgage was upon the homestead instead of other property could change the construction to be given to the act."

In re JONES.

1. A merchant tailor, who is a practical workman and who cut and fitted garments for customers and superintended their manufacture, is entitled as against the assignee in bankruptcy *to have exempt* from execution goods to the value of four hundred dollars, under the statutes of Kansas in force in 1864.
2. This is a fixed and determinate *right* given by statute, and is not dependent upon the discretion of the assignee, and where it is claimed by the bankrupt before the sale of the goods by the assignee and illegally refused, it may be asserted against the proceeds of the goods while in the hands of the court for distribution.
3. The effect of a *chattel mortgage* on the stock in trade upon the right to an exemption and what property falls within the phrase "stock in trade," as used in the exemption statute, considered.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Exemption.—Local Statute.

Petition for review under the second section of the bankrupt act. —Jones, the bankrupt, is a practical tailor, and for many years had been engaged at Leavenworth, in this state, as a

merchant tailor. That is, he kept a stock of cloths on hand for the purpose of manufacture, and not for sale. His stock embraced some furnishing goods. Jones himself cut and fitted garments, and superintended the manufacture in the rooms over the store, as well as attended in the room below, where the goods were kept and customers waited on. The value of the stock in Leavenworth at the time Jones was thrown into bankruptcy was about $1,800, on which there existed a chattel mortgage to secure a debt to one Eaves, for $1,400, which debt has since been proved before the register. At the time proceedings in bankruptcy were commenced against Jones, he had a branch of his business at Omaha, Nebraska. The goods at Omaha were worth about $2,000, were taken possession of by the assignee, brought to Leavenworth, mixed with the other goods, and by an order of the district court sold, and the proceeds, $2,700, deposited in that court, where the money yet remains for distribution to those entitled. The goods at Omaha were free from liens or mortgage. Before the assignee made sale of the goods the bankrupt applied to have set off to him as exempt under the bankrupt act and the laws of Kansas goods to the value of $400, which the assignee refused to do. After the sale the bankrupt filed in the district court a petition setting forth the foregoing facts, and praying that the sum of $400 be paid to him from the proceeds of the goods. An order was made to this effect, to reverse which the assignee has filed in this court the present petition.

Mr. Britton, for the assignee.

Sherry & Helm, for the bankrupt.

DILLON, *Circuit Judge.*—In 1864, the laws of the state of Kansas, in which the bankrupt had his domicile, contained and still contain the following provision in regard to the exemption of property:

"Eighth. The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade not exceeding four hundred dollars in value."

Exemption laws founded upon the humane policy of making provision for the support of the poor man and his family are to be liberally rather than strictly regarded. They should receive such fair construction as will best promote the beneficent intention of the legislature.

In argument, the counsel for the assignee contends that the order under review is erroneous,

1. Because Jones was a merchant, and not a mechanic or person such as is contemplated by the Kansas statute above quoted.

2. Because, conceding that Jones was entitled to the exemption, the right, although claimed before the sale, not having been recognized by the assignee or established by the court, is waived or lost.

3. Because the mortgage upon the stock in trade destroys the right to the exemption, not only as against the mortgagee, but the assignee.

Neither of these positions is well taken. Jones, as a practical workman, not selling goods as merchants usually do, but manufacturing them for customers upon special orders, under his own superintendence, is fairly within the language and clearly within the purpose of the local exemption statute. That he did not do all the work himself, but employed workmen, makes no difference. In the reverse he has met, he has need of the provision which the law makes, as much as if he had done business on a scale so small that he did all the work with his own hands.

As to the second position of the assignee, I remark that the exemption to the amount of $400 is a fixed and determinate right not dependent upon the discretion of the

assignee or court. The assignee ought to have recognized this right when it was claimed by the bankrupt before the sale, and the right may be asserted against the proceeds of the goods in the hands of the court for distribution.

As to the other point. The mortgagor does, as against the mortgagee, waive the exemption, but not as against the assignee, if there should be a surplus beyond the amount required to pay the mortgagee's debt. The proposition that the mortgage absolutely destroyed the exemption, seems to have been the very one that was relied on in the district court. But the record here discloses the facts appearing in the statement, and it is suggested that the Leavenworth goods did not sell for enough to pay the mortgage debt, and hence there is no surplus as to those goods, and the Omaha goods having been out of the state, where the bankrupt was domiciled, cannot be considered as any part of his stock in trade within the meaning of the local exemption act.

It is true that the two stocks were mingled, and that it is impossible now to ascertain how much each portion brought at the sale. It does not appear from the record before me whether the mortgagee is entitled to a lien on the proceeds for the amount of his debt or not. But aside from these considerations, which would lead to an affirmance of the order of his honor below, I am of the opinion that the Omaha stock, having been brought into this state and mixed with the other, without any fault of the bankrupt, the two should be taken as together constituting the stock in trade of the bankrupt within the meaning of the local exemption statute, and that out of this stock in trade he is entitled to claim and hold as exempt the amount of $400 in value.

The order complained of is affirmed.

AFFIRMED.

NOTE.—As to homestead exemption in Kansas, see *In re Tertelling*, *ante*; *Rix* v. *Capitol Bank*, post.

ISAACS & ASH *v.* NATHAN PRICE.

1. There is a well-known distinction between a judgment rendered without *any* service of process whatever, and one where the service is simply *defective or irregular.* In the first case the court acquires no jurisdiction, and its judgment is void; in the other, its judgment is valid until set aside or reversed.
2. Where the plaintiff brought suit before his demand was barred, and served the defendant with process, and took a judgment by default; and the defendant, after the statute period for the recovery of such claims had elapsed, procured the court to set aside the judgment: *Held* (construing the statutes of Kansas) that the plaintiff was not entitled to the benefit of the statute of limitations.
3. When an action is deemed to have been *commenced*, considered.

(*Before* DILLON, *Circuit Judge.*)

Jurisdiction.—Service of Process.—Statute of Limitations.

THIS cause was tried at the last term, and is now before the court on a motion by the defendant for a new trial. The only question in the case is whether the action is barred by the statute of limitations, and the following are the material facts relating to it: On the 2d day of December, 1865, the defendant bought of the plaintiffs certain goods and merchandise, to recover the value of which a petition was filed in this court on the 17th day of August, 1867. Summons was duly issued, and the original duly endorsed, and at the November term, 1867, judgment by defult was entered against the defendant, the record reciting that he had been duly served. The defendant was served, as hereinafter stated, by copy left at his residence, and the marshal so returned; but two years afterwards, to-wit: November 23, 1869, the defendant appeared in court and made application to set aside the judgment entered at the November term, 1867, on the ground that the *copy* of the summons served or left for him was not indorsed with the

sum or amount for which judgment would be taken if the defendant failed to answer; and at that term the marshal was permitted to amend his return by setting forth the copy of the summons produced by the defendant, and which was served on him in 1867. The original summons was regular, and contained all the indorsements; and the copy was exact except that it omitted to have indorsed the amount claimed by the plaintiffs. This was the only defect in the service then or now alleged. The court thereupon, without any other reason, and without requiring the defendant to show a meritorious defence, set aside the judgment on the ground, as the record recites, that no service of the summons had been made upon the defendant, and that he had not appeared; and thereupon, on the same day, the plaintiffs asked leave to amend their petition, and the case was continued. At the next term, May, 1870, the court, after notice and argument, refused to review and set aside the order of the preceding term, vacating the judgment, and ordered, upon plaintiffs' motion, that a new summons issue and the case be continued. On the 6th day of June, 1870, a new summons was duly issued and served, and the defendant appeared at the next term, and subsequently pleaded the statute of limitations. On the trial at the May term, 1872, the defendant was sworn as a witness and admitted the purchase of the goods sued for, and stated that they were bought on thirty, or not more than sixty days time, and relied for defence alone upon the three years statute of limitations of the state.

By the statutes of the state it is provided that "A civil action may be commenced by the filing, in the proper clerk's office, of a petition, and causing a summons to be issued thereon" (Rev. Stats. 1868, p. 640, sec. 57). And it is also provided that "Where the action is on contract for the recovery of money only, there shall be indorsed on the writ the amount for which judgment will be taken, if

the defendant fail to answer, and if the defendant fail to appear judgment shall not be rendered for a larger amount" (*Ib.* 641, sec. 59). "The service shall be made by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence" (*Ib.* sec. 64); and the officer "shall endorse on the original the time and manner of service" (*Ib.* sec. 63).

The limitation statutes provide that actions must be "*commenced* within the periods prescribed in this article," and that "an action shall be deemed commenced, within the meaning of this article, at the date of the summons which is served upon the defendant," &c., if served within sixty days (*Ib.* 634, sec. 20). "If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff may commence a new action within one year after the reversal or failure" (*Ib.* p. 634, sec. 23).

The following is the return on the first summons: "Received this summons this 17th day of August, 1867, and executed the same by leaving a certified copy thereof at the usual place of residence of the within named Nathan Price, with all the indorsements thereon." Signed by the marshal.

H. M. Herman, for the plaintiffs.

Nathan Price, and *A. H. Horton*, for the defendant.

Dillon, *Circuit Judge.*—If this action is to be deemed as having been commenced in August, 1867, when the original petition was filed, and the first summons was served in the manner above stated, it is admitted that the same is not barred. On the other hand, if the suit is to be considered as commenced only when the second summons was served,

to-wit, June 6th, 1870, then it is conceded by the plaintiff that this action is within the operation of the limitation statutes of the state. The record shows that on the 17th day of August, 1867, the petition was filed and the summons was issued. The original summons was in due form, and contained all the indorsements. The marshal made service of the summons, and returned that fact to the court, and a judgment by default was entered at the return term, reciting that the defendant had been duly served. Two years afterward the defendant appeared, and the court, on the marshal's amended return, showing that the copy of the summons which had been left at the residence of the defendant did not contain a copy of the indorsement of the amount for which judgment would be taken if the defendant failed to appear, set aside the judgment, on the ground, as the record of its action states, that no service of the summons was ever made, and no appearance to the action had.

The justice of the plaintiffs' demand not being questioned, and there being no claim that the defendant did not receive the copy of the summons before the return term, nor any claim that the judgment was taken for too much, it is plain that the order setting aside the judgment was not well considered; but it was set aside upon the ground, not that no service was ever made, but upon the technical one that the copy of the summons left for the defendant omitted the indorsement of the amount claimed by the plaintiffs to be due them. When this action of the court was had the plaintiffs issued a new summons, June 6th, 1870, which was served, and the defendant appeared and pleaded the statute of limitations; and as above remarked, his plea is available to him if the suit is to be deemed commenced June 6th, 1870, but not if it is to be regarded as having all the time been pending since its original institution. In my opinion the action is to be regarded as having been pending from

the time the petition was originally filed and the summons served in 1867. The judgment rendered upon the first return of service was not void, but in every respect regular upon the face of the record. The defendant afterwards appeared in court and asked to have the judgment set aside, and his demand was granted. This did not defeat the plaintiffs' right, or put an end to their action. After this action on the part of the defendant no new summons was necessary, and the court should only have set aside the judgment on a plea to the merits being filed. The issuing of a new summons on the same petition, or the same as amended, did not make a new suit, nor was it the *commencement* of a new action. The action which was tried at the last term is the *same action* which was commenced in August, 1867, and not a new one. For the purpose of preventing the statute of limitation from running the service of the first summons was sufficient. It apprised the defendant that the plaintiffs had brought an action against him, and where it was pending. A distinction is to be made between a case where there is *no* service whatever, and one which is simply *defective or irregular*. In the first case the court acquires no jurisdiction and its judgment is void; in the other case if the court to which the process is returnable adjudges the service to be sufficient and renders judgment therein such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal. The error in the argument of the defendant is that it proceeds upon the ground that the judgment rendered upon the service made upon him was wholly void. It is true the record which set it aside recited that no service of summons was made upon the defendant and that it was void, but this action of the court is to be construed with reference to the application upon which it was based, and that showed and admitted that service had been made, but claimed that such service

owing to the absence of the indorsement on the copy, was not sufficient. It is not entirely clear to my mind that the omission to give all the indorsements is such an irregularity as would be ground for reversal on appeal; but if so, the judgment was valid while it remained in force, and when it was set aside the action was still pending, and it remained a pending action until it was tried at the last term.

The defendant's case is not within the purpose of the limitation enactment, which is to protect persons from stale claims. But here the plaintiffs brought suit in time upon a demand confessedly just and unpaid. If the defendant had appeared at the return term he would have had no defense on the merits, and no defense under the statute of limitations. He neglects to appear at court, waits until the statute period for the recovery of such claims has fully elapsed, and then applies to the court and suggests the defective service, made over two years before, and asks to have the judgment set aside. This being done, he asks the benefit of the statute of limitations, which had not elapsed when the suit was commenced. This position overlooks the philosophy or reason on which such legislation rests, which is the neglect or laches of the plaintiff to prosecute his suit. But whatever neglect there is in this case is clearly the defendant's. Besides there never has been any failure of the plaintiffs to recover upon "the merits" of their claim upon which action was brought "within due time," and therefore the plaintiffs are within the equitable or just provision of the legislation made for such cases. (Rev. Stats. 1868, p. 634, sec. 28, quoted in the statement of the case).

Motion for new trial denied, and judgment for plaintiffs.

JUDGMENT ACCORDINGLY.

NOTE.—As to judgments rendered upon defective service, see *Salisbury* v. *Sands*, *ante*; *Morton* v. *Smith*, *post*.

COMMERCIAL NATIONAL BANK OF CLEVELAND *v.* CITY OF IOLA.

1. Article 12 of the constitution of the state of Kansas construed; and following the interpretation of the state supreme court: *Held*, that an act legalizing a special election held in a single city, and authorizing such city to issue bonds to aid a specified manufacturing enterprise, was a *special act*, and one which conferred *corporate powers* within the meaning and contrary to the prohibition of said article of the constitution.
2. The legislature of a state has no authority to authorize taxation in aid of *private* enterprises or objects; and municipal bonds issued ununder legislative authority, to be paid by taxation, as a *bonus* or donation to secure the location or aid in the erection of a manufactory or foundry owned by private individuals, are void even in the hands of holders for value.

(*Before* DILLON and DELAHAY, JJ.)

Constitutional Law.—Special Acts.—Corporate Powers.—Extent of Taxing Power.

THIS is an action on coupons attached to bonds issued by the city of Iola, in Kansas, under the authority of an act of the legislature of that state. The coupons in suit and the declaration are in the usual form. The declaration avers that the bonds to which the coupons are annexed were issued in pursuance of the act of the legislature, which went into effect February 23, 1871. The nature of this act appears in the court's opinion. It is conceded that there is *no general* statute of the state authorizing municipalities to subscribe for the stock, or otherwise to aid such enterprises as foundries or bridge companies.

The constitution of the state of Kansas, adopted in 1859, contains the following provisions: —

Article 2, Sec. 17. "In all cases where a general law can be made applicable, no special law shall be enacted."

Article 12 is entitled "Corporations."

"SEC. 1. The legislature shall pass no special act conferring corporate powers. Corporations may be created under

general laws; but all such laws may be amended or repealed."

"SEC. 5. Provision shall be made by general law for the organization of cities, towns, and villages, and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

"SEC. 6. The term 'corporation,' as used in this article, shall include all associations and joint stock companies having powers and privileges not possessed by individuals and partnerships, and all corporations may sue and be sued in their corporate name."

The declaration is demurred to on the ground that the above-mentioned act of February 23, 1871, is unconstitutional, for two reasons: 1st, because it is a *special* act conferring upon the city of Iola corporate powers; 2d, because it undertakes to authorize the levy and collection of taxes by the city authorities for *private*, as distinguished from *public*, purposes or objects.

Alfred Ennis, for the plaintiff.

McComas & McKeighan, for the defendant.

DILLON, *Circuit Judge*.—Without express legislative authority the city of Iola would have no power to appropriate money or to loan its credit to aid private persons to establish manufactories either near to, or within, the corporate limits. This proposition admits of no dispute, and is well settled. (*Stetson* v. *Kempton*, 13 Mass. 278; *Cushing* v. *Newburyport*, 10 Met. 510; *Cook* v. *Manufacturing Company*, 1 Sneed (Tenn.), 698; *Pennsylvania Railroad Company* v. *Philadelphia*, 47 Pa. St. 189; Dillon Munic. Corp. sec 106.) No precedent authority either by general or special act was conferred upon the city to pass the ordinance to provide for the holding of the election to determine whether the citizens

would extend the proposed aid to the bridge manufactory and foundry. The adoption of the ordinance and the holding of the election were without color of law.

But subsequently the legislature passed the act mentioned in the statement of the case, which undertook to legalize the election and to authorize the issue of the bonds in question. The bonds were issued under the authority of this act, and so the declaration alleges. Their binding obligation upon the municipality depends upon the validity of this enactment, and the question of its validity is raised by the demurrer to the declaration.

Against the act two objections are urged in argument: 1st, that it contravenes certain special provisions of the constitution of the state; 2d, that it authorizes the levy and collection of taxes for objects or uses not within the scope of the taxing power.

The act whose constitutionality we have to determine purports to legalize the prior election in Iola and to authorize the issue of bonds pursuant to that election. If the legislature might have passed such an act prior to the election, it will not be disputed that it can ratify and confirm an election held without it, but the legislature, it is clear, cannot do by a curative or retrospective act what it could not have previously authorized. (Cooley Const. Lim. 281.)

The act which was passed and which went into effect February 23, 1871, after reciting the election and legalizing it, authorizes the city to appropriate $50,000 to aid in the erection of buildings at or near the city of Iola, to be used for the purpose of manufacturing bridges, plows, and stoves, and to issue and deliver the bonds of the city, with coupons attached, payable in fifteen years, and enjoins that it shall levy and collect taxes to pay the principal and interest of the bonds.

It is objected that this act violates section 1 of article 12

of the constitution of the state, which provides that the legislature shall pass no *special* act conferring corporate powers. That the act in question is a special act is so plain as not to justify extended discussion. It is not only limited in its application to the city of Iola, but to a single election and the issue of specific bonds. Never was an act more manifestly special.

It seems to me to be almost equally clear that it is an act which undertakes to confer upon a city *corporate powers.* It ratifies an election held by the city, and authorizes it to do what, without an express grant, no municipality can do, namely, to issue bonds in aid of a manufacturing enterprise, and to levy and collect taxes to pay such bonds. If the power to create a debt binding upon the municipality, and to lay burdens upon all the property within it to pay the debt created, is not a corporate power, it is difficult to conceive what could justly be regarded as such.

The powers given by the terms of the act under discussion are the most important of any which can be conferred upon municipal corporations. They are, indeed, precisely the powers the exercise of which is most to be feared, and which were particulary liable to be unwisely conferred by special legislation. If this prohibition in the constitution (sec. 1, art. 12) applies to municipal corporations, the special act in question plainly contravenes it.

Whether the 12th article of the constitution of Kansas, quoted in the statement of the case, was designed to apply to municipal corporations, might admit of some discussion if the question were *res nova.*

This article is taken from the constitution of Ohio.* And the supreme court, not only of that state, but of Kansas,

* Sections 1 and 2 of Article 13 of the constitution of Ohio are the same as Section 1 of Article 12 of the constitution of Kansas. Section 6 of Article 13 of the Ohio constitution is the same as Section 5 of Article 12 of the Kansas constitution.

has, upon full consideration, repeatedly decided that it did include municipal corporations. (*Atchison* v. *Bartholew*, 4 Kansas, 124, 1866; *Wyandotte City* v. *Wood*, 5 Kansas, 603, 1870; *The State* v. *Cincinnati*, 20 Ohio St. 18, 1870; following, *Atkinson* v. *Railroad Company*, 15 Ohio St. 21, 1864.)

In the first case cited, the supreme court of the state of Kansas held that the constitution compelled the legislature to regulate the grant of powers to municipal corporations by *general* laws; and hence a *special act*, or an act specially amending the charter of the city of Atchison in respect to making local improvements and local assessments was void. In the case next cited (*Wyandotte* v. *Wood*) the same court adhered to this view, and accordingly held that an act of the legislature specially extending the limits of the city of Wyandotte was unconstitutional, because it contravened both sections 1 and 5 of article 12 of the constitution.

So in the case of the *State* v. *Cincinnati*, above cited, the supreme court of Ohio, under the same constitutional provisions, held that the legislature cannot, by special act, create a corporation; nor, by special act, confer additional powers on a corporation already existing, and that in these respects there was no difference between private and municipal corporations since the constitution equally embraced and equally applies to both classes; and therefore the act of April 16, 1870, "to prescribe the corporate limits of Cincinnati," being considered a special act, was adjudged void. See, also, *Atkinson* v. *Railroad Company*, *supra*. In this case, RANNEY, J., thus expounds the constitution: "These provisions of the constitution are too explicit to admit of the least doubt that they were intended to disable the general assembly from either creating corporations or conferring upon them corporate powers by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of

making such law applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation; and, finally, of making all judicial construction of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the constitution as will preserve its leading objects intact." One of these objects in Kansas, as well as in Ohio, was to cut up by the roots the mischief of special legislation, particularly in respect to corporations, both public and private. The object would be defeated if the special act relating to the city of Iola could stand.

If, under the doctrine of *Butz* v. *Muscatine*, 8 Wall. 575, this court is not absolutely bound, in this class of cases, to follow the interpretation of the state constitution given by its highest court, yet it seems that it ought to follow it where it appears to rest upon solid grounds, and was made in cases and in respect to questions where there was nothing to warp the judgment of its judges, and where the interpretation was settled or had been declared at the time the act in controversy was passed.

In the latest case on this subject, decided by the supreme court of the United States, it is not denied that the supreme court of a state is the appointed expositor of its constitution and laws, and that the federal courts will adopt as rules for their own judgments the decisions of the highest courts of the state "respecting local questions peculiar to itself, or respecting the construction of its own constitution and laws." It only denies the binding force of the state adjudications which rest upon general principles of law, and not upon the meaning of special constitutional or legislative provisions. (*Olcott* v. *Supervisors*, U. S. Supreme Court, Dec. Term, 1872—Reported 5 Chicago Legal News, 397.)

I think the present case is one in which it is the duty of this court to follow the decisions of the state supreme court;

and so far as my judgment rests upon the special provisions of the constitution above referred to, I place it upon the state adjudications without an inquiry into their soundness.

But suppose the enactment under which the bonds in question were issued is not "a special act conferring corporate powers" within the meaning of the constitutional prohibition, the other objections made to the validity of the bonds remain to be considered. The act authorizes the creation of a debt by the municipality to raise money by the issue of bonds to be given as a donation or bonus "to aid in the erection or completion of buildings at or near the city of Iola to be used for the purpose of manufacturing Z. King's patent bridges, and as a foundry and iron works," and the act also authorizes and requires the levy and collection of such taxes as may be necessary to pay the interest and principal of these bonds. It is important to be observed that this is undeniably a private enterprise. These buildings and works are the private property of the owners. No public or municipal control over this property or the enterprise aided is specially reserved or provided for, and none exists different from that which exists as to all other property owned by private persons and devoted to private uses. The proprietors of these works are under no obligations, by reason of the aid extended and the burden of taxation thereby imposed upon the municipality, to render it or the state any duty or service whatever — not even to repay the loan, or to maintain for any specified time the contemplated manufacturing enterprise. The state or city could not compel them to complete or operate the works or prevent their removal at pleasure to some other locality.

And thus we have presented the inquiry than which no question concerning the property-rights of the citizen is of more transcendent moment, viz: Whether the legislature may thus compel or coerce the citizen to aid in the establishment of purely private enterprises or objects *because*

these will or may incidentally promote the general good of the community or locality.

I think it safe to affirm that no such principle has yet received judicial sanction. On the contrary, the principle has been declared unsound by courts of the highest respectability.

The general subject of the extent of the taxing power in connection with municipal aid to railways has been thoroughly discussed in a majority of the states of the Union, and recently by the supreme court of the United States. (*Olcott* v. *Supervisors*, reported 5 Chicago Legal News, 397; *Railroad Company* v. *Otoe County*, Dec. Term, 1872.) The courts everywhere have agreed that taxes can lawfully be imposed for public purposes only; and therefore, in the language of Chief Justice BLACK, "The legislature has no constitutional right to create a public debt or authorize any municipal corporation to do it in order to raise funds for a mere private purpose.

"No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional, for all the reasons which forbid the legislature to usurp any other power not granted to them. * * * An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legisla-

tive, but judicial, and was not given to the assembly by the general grant of legislative authority." (*Sharpless* v. *Philadelphia*, 21 Pa. St. 147.) Similar language is held by Mr. Justice STRONG, in delivering the opinion of the supreme court of the United States in the recent case of *Olcott* v. *Supervisors of Fon du Lac County*, Dec. Term, 1872, reported 5 Chicago Legal News, 397. The learned justice says "that the taxing power of the state extends no further than to raise money for a public use, as distinguished from private, or to accomplish some end public in its nature." Again he says: "No one contends that the power of a state to tax, or to authorize taxation, is not limited to the uses to which the proceeds may be devoted. Undoubtedly taxes may not be laid to a private use." (See *Freeland* v. *Hastings*, 10 Allen, 570; *Tyson* v. *School Directors*, 51 Pa. St. 9.)

The only question, therefore, is, whether the use for which taxation in the present case is authorized is a public or a private use. The supreme court of the United States, in sustaining the validity of legislative acts authorizing municipal aid to railways, place it upon the distinct ground that highways, turnpikes, canals, and railways, although owned by individuals under public grants or by private corporations, are *publici juris;* that they have always been regarded as governmental affairs, and their establishment and maintenance recognized as among the most important duties of the state, in order to facilitate transportation and easy communication among its different parts. (*Rogers* v. *Burlington*, 3 Wall. 654; *Mitchell* v. *Burlington*, 4 Wall. 270; *Railroad Company* v. *Otoe County*, *supra.*) Therefore it is that in favor of such improvements the state may put forth its right of eminent domain, and also as now established by judicial decisions, unless the right be denied it in the constitution, its power to tax. That these acts may lawfully be done is because, and only because, the use is a public one; public in its nature, and hence these works are subject to public control

and regulation, notwithstanding they may be constructed under legislative authority and be exclusively owned by private persons or corporations. Compulsory taxation in favor of railways and like public improvements owned by individuals or companies, is an exercise of power going quite to the verge of legislative authority. Although it is a doctrine that must now be considered as judicially settled, still it is one which has encountered a vigorous opposition, both on the ground of expediency and of power, and the exercise of the authority has been so disastrous, as already in some of the states to have led to constitutional provisions for the protection of the citizen.

But it is obvious from the statement of the grounds upon which such legislation rests, that it furnishes no support for the validity of taxation in favor of enterprises and objects essentially private; and such I consider to be the establishment of a bridge manufactory or foundry owned by private individuals Cases may be imagined giving rise to doubts whether the use be public or private, but the one in hand does not seem to be difficult to class. It is certainly not usual for the legislature to undertake to exercise the right of eminent domain to procure sites for hotels, banks, manufactories, stores, and the like, and it may be safely said, unless extraordinary circumstances may occasionally furnish an exception, that private property cannot lawfully be condemned for such purposes; and the reason is that it would not be a taking for public use, nor justified by any reasonable necessity.

So taxation to aid ordinary manufactories or the establishment of private enterprises is a device, until recently, quite unheard of; and the power must be denied to exist unless all limits to the appropriation of private property and to the power to tax be disregarded. The question under discussion must be determined upon some principle, and I hold it to be sound doctrine that the mere incidental

benefits to the public or the state which result from the pursuit by individuals of ordinary branches of business or industry do not constitute a public use in a sense which justifies the exercise of either the power of eminent domain or of taxation.

If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character.

That these views are sound I entertain no doubt, but my conviction of their soundness has been much strengthened by the decision of the supreme judicial court of Massachusetts, declaring unconstitutional the act authorizing the issue of what is known as the "Summer Street Fire Bonds." In November, 1872, a considerable portion of the city of Boston was destroyed by fire. In December following the legislature empowered the city to issue bonds to the amount of twenty-five millions of dollars, the proceeds of which three commissioners, appointed by the mayor, were authorized to loan in a safe and judicious manner "in such sums as they shall determine, to the owners of land, the buildings upon which were burned by the fire in said Boston, on the ninth and tenth days of November, 1872, upon the notes or bonds of said owners secured by first mortgages of said land; said mortgages to be conditioned that the rebuilding shall be commenced within one year from the first day of January, 1873; and said commissioners to have full power to apply the proceeds of said bonds in making said loans in such manner, and to make such further provisions, conditions, and limitations in reference to said loans, and securing the same, as shall be best calculated, in their judgment, to insure the employment of the same in rebuilding upon said land burned over, and the payment thereof to the said city."

In the late case of *Lowell et al* v. *Boston*, the constitutionality of this act was the question to be decided. It will be seen that the object of the act, as shown by its provisions,

was "to insure the speedy rebuilding on land the buildings upon which were burned" by the great fire; and the question was as to the right of the state to impose any taxes for this object, and this depended upon the further question whether this object was, in a legal sense, a public object.

The court distinctly held, to use the language of the rescript sent down in the case, that taxes can only be laid "for some public service or some object which concerns the public welfare;" that "the preservation of the interests of individuals either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object." "That the incidental advantages to the public or to the state which result from the promotion of private interests, or the prosperity of private enterprises or business, do not justify their aid by taxation." "That as a judicial question the case is not changed by the magnitude of the calamity which has created the emergency." And, finally, the court say: "The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature, and the city cannot legally issue the bonds for the purposes named in the act." See, also, as to distinction between public and private use: *Bloodgood* v. *Railroad Company*, 18 Wend. 65; *Jenkins* v. *Andover*, 103 Mass. 94, holding invalid a statute authorizing taxation in favor of a private incorporated academy. Same principle, *Curtis* v. *Whipple*, 24 Wis. 350; *People* v. *Salem*, 20 Mich. 452.

As the only authority for the issue of the bonds in question was an unconstitutional act of the legislature, they are void — void from the beginning, and void into whosesoever hands they may come. All persons must, at their peril, take notice of the *power* of municipal corporations or officers to issue securities, and especially is this so where the want of power results from constitutional prohibitions or provis-

ions. (*The Floyd Acceptances*, 7 Wall. 676; *Marsh* v. *Fulton Co.* 10 Wall. 676; *Clark* v. *Des Moines*, 19 Iowa, 199; *Steines* v. *Franklin Co.* 48 Mo. 167.)

The demurrer to the declaration is sustained, and unless the plaintiff desires to amend, judgment will be entered for the defendant.

JUDGMENT FOR DEFENDANT.

NOTE.—In *Allen* v. *Inhabitants of Jay*, 12 Am. Law Reg. (N. S.) p. 481, the supreme court of Maine recently decided (July term, 1871) a similar question. The opinion of the court was delivered by APPLETON, C. J. In that case the legislature had authorized the town of Jay to lend $10,000 to certain men to enable them to build a saw mill and grist mill, and to exempt the mills from taxation for ten years, and the act was adjudged invalid: Dillon Munic. Corp (2d ed). sec. 105, *a*. The following is the rescript sent down by the supreme judicial court of Massachusetts in the case of *Lowell* v. *Boston*, *supra*:—

"The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for the payment of the bonds.

"The point of difficulty in the case is not as to the distribution of the burdens by allowing it to be imposed upon a limited district within the state, but as to the right to impose any tax for the object contemplated by the statute.

"The power to levy taxes is founded upon the right, duty, and responsibility to maintain and administer the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditures which it is intended to meet, shall be for some public service or some object which concerns the public welfare.

"The preservation of the interests of individuals either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental.

"The incidental advantages to the public or to the state which result from the promotion of private interests, and the prosperity of private enterprises or business, do not justify their aid by the use of public money raised by taxes alone, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure

which must determine its vali ity, as justifying a tax; and not the magnitude of the private interests to be effected, or the degree to which the general interests of the community, and thus the public welfare, may be ultimately benefited by the promotion of those private interests.

"By the terms of the statute, the proceeds of the bonds thereby authorized are to be expended in loans to persons who are or may become owners of land in Boston, 'the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of November, 1872.' The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is to 'insure the speedy rebuilding on said land.'

"The property thus created will remain exclusively private property, to be devoted to private uses, at the discretion of the owners of the land, with no restrictions as to the character of the buildings to be erected or the uses to which they shall be devoted, and with no obligation to render any service or duty to the commonwealth or the city — except to repay the loan — or to the community at large, or to any part of it.

"If it be assumed that the private interests of the owners will lead them to re-establish houses, shops, and manufactories, and that the trade and business of the place will be revived or enlarged by means of the facilities thus afforded, still these are considerations of private interest, and if expressly declared to be the aim and purpose of the statute, they would not constitute a public object in any legal sense.

"As a judicial question, the case is not changed by the magnitude of the calamity which has created the emergency, nor by the greatness of the emergency or the extent and importance of the interests to be promoted. These are considerations affecting the propriety and expediency of the expenditure, as a legislative question only. If an expenditure is, in its nature, such as will justify taxation uuder any state of circumstances, it belongs to the legislature exclusively to determine whether it shall be authorized in the particular case; and however slight the emergency or limited and unimportant the interests to be promoted, the court has no authority to revise the legislative action.

"On the other hand, if its nature is such as not to justify taxation in all cases in which the legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance, or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor, in any particular, will satisfy the element necessary to bring it within the scope of legislative power.

"The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature; and the city cannot legally issue the bonds for the purposes named in the act."

CHARLES N. RIX, Assignee of James R. Stilwell, Bankrupt, *v.* THE CAPITOL BANK OF TOPEKA, KANSAS.

1. The provision of the constitution of Kansas in relation to the *homestead exemption* construed; and held that the title to property occupied by the bankrupt and his family as a residence at the time of the filing of the petition in bankruptcy did not pass to or vest in the assignee, but remained in the bankrupt, and hence the assignee in bankruptcy could not maintain a bill to have a prior mortgage, otherwise valid, set aside, because it gave a preference contrary to section 35 of the bankrupt act, nor to restrain the foreclosure of such mortgage in the courts of the state.
2. Effect of *abandonment of homestead* by owner and family discussed.

(*Before* DILLON and DELAHAY, JJ.)

Bankrupt Act.—Homestead.—Construction of Constitution of Kansas, and Section 14 *of Bankrupt Act, as to Homestead Exemption.*

THIS is a bill brought by the assignee in bankruptcy of James R. Stilwell to set aside a mortgage made by the bankrupt and his wife to the defendant within four months of the commencement of the proceedings in bankruptcy. The averments of the bill make a case of fraudulent preference within the 35th section of the bankrupt act. After the bankruptcy the defendant commenced suit in the state district court for Shawnee county to foreclose its mortgage.

The present cause was submitted to the court, upon the following agreement as to facts:—

"It is agreed in this case that the mortgage made by J. R. and S. E. Stilwell to the Capitol Bank mentioned in the bill on file, was, under the bankrupt law, a fraudulent preference of a creditor (the Capitol Bank) of said J. R. Stilwell, and must be set aside, unless the same is held to be valid in law upon the following facts, which are also agreed to be true:—

"*First.* The real estate mentioned in said mortgage was, at the time the same was executed and delivered, and for some time previous thereto had been, the proper 'homestead' of the said J. R. Stilwell, who was then the head of the family, and all of whom then occupied said real estate as such homestead.

"*Second.* The said J. R. Stilwell and family continued to own and occupy said premises as a homestead until after said adjudication in bankruptcy.

"*Third.* That after said adjudication the said J. R. Stilwell left the state of Kansas, and has not since returned.

"*Fourth.* After the filing of the petition in the district court of Shawnee county, mentioned in said bill, the wife and children of said J. R. Stilwell removed with all their effects from the state of Kansas, and have not since returned. No application has been made by said Stilwell or his family, or any one for them, to the said assignee to have said real estate set off to them as and for a homestead, nor has the same been so set off."

The constitution of the state, adopted in 1859, and yet in force, provides that "a homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all improvements upon the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists. * * *Provided*, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." (Const. of Kansas, art. 15, sec. 9.)

Section 14 of the bankrupt act provides that "The judge or register shall, by an instrument under his hand, assign and convey to the assignee all, etc., * * and such assignment shall relate back to the commencement of said pro-

ceedings in bankruptcy; *provided*, however, there shall be excepted from the operation of the provisions of this section * * * and such other property not included in the foregoing exceptions as is exempted from levy and sale, upon execution or other process, or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy; * * * *provided*, that the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees. *And in no case shall the property hereby excepted pass to the assignees*, or the title of the bankrupt thereto be impaired or affected by the provisions of this act."

G. C. Clemens, for the plaintiff.

N. C. McFarland, for the defendant.

DILLON, *Circuit Judge.*—We hold the following propositions:—

1. That the property in question, being admitted to be the *homestead* of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and as such being "exempted" by the constitution of the state "from forced sale under any process of law," the same was "excepted" by the bankrupt act (sec. 14) "from the operation of the provisions" of that section, and the "*title*" thereto did not "pass to the assignee," nor was "the title of the bankrupt thereto impaired or affected by the provisions of this [the bankrupt] act."

2. The constitutional provision respecting the homestead recognizes the validity of a "lien" thereon, "given by the consent of both husband and wife;" the mortgage, therefore, to the defendant by the bankrupt and wife created a valid lien upon the homestead property in favor of the mortgagee, but such mortgage did not otherwise affect the

right of the owner to the homestead exemption, which, as against general creditors, and as against the assignee in bankruptcy, continued to exist, notwithstanding such mortgage.

3. The property mortgaged is admitted to be "the proper homestead" of the mortgagor and his family, and being within the limits of an incorporated city, and not appearing to exceed the quantity allowed by law, the statutes of the state (sec. 2, chap. 38, p. 473) do not require, in order to preserve the exemption, that the owner shall apply to have the property selected and set apart as a homestead.

4. Under the constitution of the state and the bankrupt act (sec. 14) the *title* to homestead property, that is, to property in good faith, "occupied as a residence by the family of the owner," at the time of the commencement of the proceedings in bankruptcy, does not pass to the assignee, but remains in the bankrupt. If it had been admitted or established that the bankrupt had *subsequently abandoned* the homestead, this would give no right to the assignee; but the mere fact that since the adjudication of bankruptcy "Stilwell has left the state and has not since returned, and that his family have removed with their effects from the state and have not since returned," does not, to say the least, very clearly negative an intention to return to the homestead, nor preclude the right to do so and redeem the mortgage and have the benefit of the exemption. The proof of an intention to abandon (if it be conceded that in Kansas the homestead right can be lost by abandonment of the property) should be clear and decisive. (See *Shepherd* v. *Cassidy*, 20 Texas, 24; Ib. 96; *Davis* v. *Andrews*, 30 Vt. 678; 1 Am. Law Reg. (N. S.) 711, 712). In any view of the case the assignee in bankruptcy has no title to or right in the homestead property, and hence cannot maintain a bill to have the mortgage thereon adjudged fraudulent as

against the bankrupt act, nor to restrain its foreclosure in the state court.

DELAHAY, J., concurs.

BILL DISMISSED.

NOTE.—Construction of provision of constitution of the state as to homestead exemption, see *In re Tertelling, ante.*

Mortgage of homestead: 1 Am. Law Reg. (N. S.) 707 *et seq.*

Effect of abandonment of homestead property: 1 Am. Law Reg. (N. S.) 710.

THE KANSAS VALLEY NATIONAL BANK OF TOPEKA *v.* MILO ROWELL, Assignee in Bankruptcy of P. C. Schuyler & Son, Bankrupts.

1. A bank organized under the national banking act of June 3d, 1864, can not take a mortgage upon real estate as a security for a debt concurrently created or for future advances.
2. Sections 8 and 28 of said act construed.

(*Before* DILLON and DELAHAY, JJ.)

National Banks.—Power to Take Real Estate Security.

THE bill of the complainant is for relief, and asks the decree of this court for the reformation of a mortgage executed by Philip C. Schuyler, one of the bankrupts, upon the ground that, by mistake, the instrument was so drawn as not to embrace the particular property which had been agreed upon, and which it was intended between complainant and said bankrupt should be embraced therein. The bill sets forth the negotiations and inducements which resulted in the execution of the mortgage, with the consideration moving from the complainant to the bankrupt therefor.

The bill is accompanied by the mortgage, the reformation of which is prayed, and reference thereto for greater certainty is made.

The bill charges that on the 8th day of August, 1870, the bankrupts were indebted to the complainant $3,003.31, for money loaned and advanced before that date, and that a note for that amount was that day made by the bankrupt, Philip C. Schuyler, therefor, payable ninety days thereafter. That on the 8th day of August, 1870, "as the result of certain negotiations which for some time then past had been going on between your orator and said bankrupt, Philip C. Schuyler proposed to give your orator a mortgage" to secure the note for $3,003.31, "and, besides securing said note, was also to secure the repayment to your orator of any sum or sums of money not exceeding in the aggregate the sum of $3,000, which your orator might or should advance to the said Philip C. Schuyler & Son, at any time within one year from the date of said mortgage, to-wit: the 8th day of August, A. D. 1870, it having been agreed between your orator and said bankrupts previously to the taking of said mortgage, and as a part of the agreement made during said negotiations, that your orator would advance to said bankrupts said amount of money, provided the said advances should be secured by a mortgage on said premises," &c. The bill then alleges that the property was of great value, by reason of mills thereon, "and upon the inducement of obtaining a mortgage on said premises as security, your orator was persuaded to take said mortgage and to make said agreement to advance," &c.

The agreement between the complainant and the bankrupt, as thus particularly set forth, shows that the consideration upon which the bankrupt agreed to make the mortgage was: First, the existing debt of the bankrupts, P. C. Schuyler & Son, to the complainant; and second, the agree-

ment by the complainant that it would make the future advances, provided they were secured by the mortgage. The bill alleges that such advances were afterwards made to the bankrupt pursuant to said agreement.

The 8th section of the national banking or currency act, of June 3d, 1864, in enumerating the powers of associations formed thereunder, provides that they "may make contracts * * as fully as natural persons," * * and "exercise under this act all such incidental power as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; and its board of directors shall also have power to define and regulate, by by-laws, not inconsistent with the provisions of this act, the manner in which its general business shall be conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed," &c.

The 28th section enacts "that it shall be lawful for any such association to purchase, hold, and convey real estate, as follows: First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages, held by such association, or shall purchase to secure debts due to said association.

"Such association shall not purchase or hold real estate in any other case, or for any other purpose, than as specified in this section. Nor shall it hold the possession of any real

estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due it for a longer period than five years."

The cause came before the court on a general demurrer to the bill for want of equity.

C. C. Clemens, for the complainant.

John K. Cravens, for the assignee.

DILLON, *Circuit Judge.*—The mortgage of which a foreclosure is sought, was made by the bankrupt for the double purpose of securing a debt to the plaintiff *previously contracted*, and to secure *future advances*, which are alleged to have been subsequently made. The mortgage is upon real estate. The bill alleges a mistake in the description of the property, and asks that this mistake be corrected and the mortgage foreclosed. The assignee files a general demurrer, and insists that under the national banking act of June 3d, 1864 (sections 8 and 28), the plaintiff, as a corporation organized under that enactment, has no right to take, hold, or foreclose a mortgage upon real estate, except as a security for a debt contracted before the taking of such mortgage; that the mortgage here in question was made upon but *one* consideration, part of which, to-wit, that part which related to future advances, is illegal, and being so, the mortgage is wholly void.

Upon the averments of the bill it is my opinion that the mortgage was made for the two purposes above mentioned, namely, to secure a precedent debt to the bank, and also to secure future advances to be made by the bank.

I am also of the opinion (under sections 8 and 28 of the national banking act), that a mortgage upon real estate is clearly authorized as "a security for debts previously contracted," and as clearly unauthorized when made as a secu-

rity for money to be thereafter advanced by the bank, on the strength of such security.

The mortgage in question rests upon a valid consideration, and is authorized by the law, so far as it secures a debt previously due to the bank, by the mortgagor; and it is invalid so far as it undertook to secure a debt then or thereafter to be created. The line which separates that which is good from that which is bad, is plain; and I am of opinion that the defendant's counsel are mistaken in supposing this to be a case in which the consideration is indivisible and the whole mortgage void. The two parts of the security are easily separable, and the result is that the good stands, and the bad must fall.

It follows that the court may correct the mistaken description in the mortgage in suit and enforce the same, so far, and so far only, as it was given to secure a debt to the bank previously contracted. The demurrer being general, it is overruled.

DELAHAY, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—See on subject of foregoing opinion: *Fowler* v. *Scully*, Sup. Ct. Pa. 5 Chicago Legal News, 193; *Baird* v. *Bank*, 11 S. & R. 411; *Blunt* v. *Walker*, 11 Wis. 347; *Bank* v. *North*, 4 Johns. Ch. 372. Mortgages to national banks are valid for previous debts: *Allen* v. *National Bank of Xenia*, Sup. Ct. Ohio, 1873.

SAMUEL F. CRAIG v. SMITH & HALE.

Plaintiff's patent for improved well-tube, sustained.

Mr. Ennis, for the plaintiff.

Mr. Williams, for the defendants.

DILLON, *Circuit Judge*.—On the 11th day of June, 1867, the plaintiff received a patent for an improved well-tube,

and files a bill charging the defendants with infringing his patent, and asking an account of profits and an injunction.

The answer denies that the plaintiff was the original and first inventor; states the invention claimed by the plaintiff was previously invented by one Rabbit, and others, and denies the alleged infringement, though the defendants admit that they have used a well-tube of the character they describe.

Upon the evidence before us, the court is not able to say that it has been established that the plaintiff is not the original and first inventor of the combination and arrangement claimed by him to be new.

It seems to us that the value of the plaintiff's invention consists in the wire gauze securely fastened to the *outside* of the perforated well-tube; and that the tube used by the defendants is made upon substantially the same principle. The use of wire, instead of solder, to fasten or secure the screen or gauze in its place, does not prevent the defendants' tube from being an infringement of the plaintiff's. The principal doubt we have had relates not to the priority or value of the plaintiff's invention, but to the sufficiency of the description of his claim; but we have thought it our duty to resolve the doubt in favor of the patentee. On the whole, we think the plaintiff entitled to an injunction, and to an account of damages and profits.

ORDERED ACCORDINGLY.

EIDEMILLER *v.* WYANDOTTE CITY.

1. Where the constitution of a state requires payment of compensation to the land owner or a deposit for him of the amount in money *before* private property can be appropriated for public use, such payment or deposit is a condition precedent to the appropriation of the property, and if a corporation, public or private, is proceeding to take posses-

sion of private property without making such payment or deposit, the land owner is entitled to an *injunction* to restrain it, where the injury is *irreparable.*

2. The making of an embanked roadway for public use was held to be an irreparable injury within the meaning of the rule.
3. And in such a case also the land owner may have an injunction *pending an appeal* taken by him from the assessment of damages, where compensation has not been paid or deposited, and where no different provision is made by law.
4. *Constitution of Kansas* on the subject of the right of eminent domain, construed and applied.

(*Before* DILLON, *Circuit Judge, at Chambers in the City of Davenport*).

Eminent Domain.—Compensation.—Injunction.

APPLICATION for injunction. The complainants own a tract of land now in the limits of Kansas City, Kansas, containing about four acres, and situate on the Kansas river, opposite the city of Wyandotte. A new bridge has been built across the river between these two places. The west end is on or at the end of a street in Wyandotte; the east end on the land of the complainants, and about twenty feet above its surface. Steps were taken to lay a road through this land by the *county* authorities; viewers were appointed and damages assessed to the complainants, who, being dissatisfied, appealed to the court, which appeal is still pending. Subsequently, Kansas City, Kansas, was incorporated, within which the above mentioned lands of the complainants are situated. It does not appear that the county or city authorities of either Wyandotte or Kansas City ever paid, tendered, or deposited for the plaintiffs any money in payment or compensation for the right of way through their land. The city of Wyandotte, it is admitted, is making the approach to the bridge, and for that purpose is hauling earth over the bridge and putting it upon the road bed over and upon the lands of the plaintiffs within the limits of Kansas City. The bill makes the city of Wyandotte, the

mayor, and the members of the city council, and certain employes of the said city, defendants, and prays a temporary injunction against further filling in or using the complainants' land, and for general relief. The case came before the circuit judge at his chambers, on the motion of the complainants, for the allowance of an injunction.

Kimball & Cravens, for the motion.

Scroggs & Bartlett, opposed.

DILLON, *Circuit Judge*.—The constitution of Kansas provides that " no right of way shall be appropriated to the use of any corporation, until full compensation therefor be *first* made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation." (Art. 12, sec. 14).

From the showing made in this case, it appears that steps were taken to condemn a right of way by the county authorities for a public road or highway through the land of the complainants; that they appealed from the assessment of damages; that this appeal is still pending; that subsequently the territory through which the road was laid was incorporated as a city of the third class under the general laws of Kansas, by the name of Kansas City; that the city council of the latter place, by resolution, has given to the city of Wyandotte the right to improve the said highway and street in the former place, and fill the same so as to connect it with the bridge across the Kansas river, which divides Wyandotte and Kansas City, and that Wyandotte city is now employing a large force of men in making the approach to the bridge by filling up the road or way thus proposed to be laid out through the land of the complainants.

The bridge between the two places appears to have been built at the joint expense of the city of Wyandotte and of

the county of Wyandotte, under a contract between the county commissioners and the King bridge company, in relation to which there is a dispute between the county and this company. The county has never accepted the bridge, and the present board of county commissioners deny the authority of the former board to make the contract for its erection, and repudiate the bonds issued in payment or part payment for it. The contractors claim a balance due them of over $20,000. The west end of the bridge in question is at the end or on one of the streets of Wyandotte city. The east end of the bridge is in Kansas City, Kansas, at the end of the road or highway before mentioned, and on the land of the complainants. The middle thread of the river is the boundary line between the two cities. It will thus be seen that Wyandotte is engaged in making an approach to the bridge, not only without her own limits, but within the limits of another municipal jurisdiction. This is being done, however, with the assent of the corporate authorities of the latter place. This approach is being made by filling with earth upon the lands of the complainants a road bed, about 80 feet wide and 20 feet deep at the bridge, thus dividing these lands by a high embankment, which, it is alleged, will greatly injure them and destroy them for the uses to which they are devoted by the complainants. It is alleged that no payment for the land thus appropriated has ever been made or tendered or deposited for the complainants. A temporary injunction is prayed to restrain the defendants from further proceedings with their work upon the complainants' lands, or using them, and for general relief.

No compensation having been made, tendered, or deposited for the plaintiffs, as required by the constitution of Kansas to be *first* done before their property can be appropriated to public use, it follows that they have never been divested either of the title or right of possession of their lands by the proceeding to lay out the county road through

them. Damages were awarded them, but being dissatisfied they appealed from the decision of the county commissioners to the district court. The statute gives the right to appeal in such cases "upon the same terms, in the same manner, and with the like effect as in appeals from judgments of justices of the peace." (Gen. Stat. 1868, p. 900, sec. 7.) I have discovered no provision regulating the rights of the parties pending the appeal. To enter upon the lands of another, not for a preliminary and temporary purpose, but for the purpose of making an embankment or roadway upon them for public travel and use is a clear *taking* or "*appropriation*" of the land; and this the constitution of the state says shall not be done "until full compensation therefor be *first* made in money, or secured by deposit in money, to the owner." Here no compensation has been made to the owners, nor secured to them by a deposit of money, and therefore the public authorities have no right thus to use the complainants' lands without their consent, and the use of them in the manner here shown is in violation of their rights guaranteed by constitutional provision. It does not appear that the amount awarded by the county commissioners was ever paid, or tendered, or placed on deposit for the complainants, and therefore we need not now inquire what effect that would have had on their rights had this course been pursued. The statute gives the land owner an unqualified right to appeal, and pending this appeal (in the absence of statute provisions to the contrary, and in the absence of any payment, tender, or deposit of the money), such owner's rights are not divested or affected by a mere unpaid award or assessment of damages. Whether the constitution does not imply and mean that there shall be a final ascertainment of what the "full compensation" to the owner is, and that when thus ascertained *this precise amount* must be paid in money, or deposited in money, before the owner can be deprived of the use of his land, I need not now give any

opinion; for if it be conceded that the legislature under the constitution could authorize the use by the public, after a deposit of the amount awarded by the commissioners, and pending the appeal, it does not appear that any such provision has been made by the legislature, or any such course pursued by the public authorities.

It is objected by the defendants that the complainants are not entitled to an injunction, because the injury complained of is not irreparable, and because they have a full and adequate remedy at law. These positions are controverted by the complainants, who maintain that such an embankment is an irreparable injury to their land, and that as the acts of the city of Wyandotte with respect to this land are acts done wholly outside of the limits of the city they are *ultra vires*, and give no action whatever for damages against the city in its corporate capacity.

I deem it unnecessary to follow the counsel in these discussions. The making of a high embankment of great width and length, to be used as a public roadway, falls, I think, within the legal notion of an irreparable injury, and gives a clear and recognized right to an injunction.

And it has been held that when an appeal is given by law, and the land owner availed himself of it, he was entitled, in the absence of provisions to the contrary, to the possession of his land during its pendency, and to an injunction, if necessary to protect such possession. *Browning* v. *Railroad Company*, 3 Green Ch. N. J. 47; *Trustees of Iowa College* v. *City of Davenport*, 7 Iowa, 213.

Compensation and appropriation should be concurrent (2 Kent, 339, *note;* Cooley Const. Lim. 567), and under the constitution of Kansas must be; or rather compensation or deposit of money must precede the appropriation of the land.

It was suggested at the argument that the proper order would be one denying the injunction, if the highest proba-

ble amount to which the complainants would be entitled were brought into court for their benefit. But this court has no jurisdiction or control over the proceedings in condemnation, nor over the county authorities by which these proceedings were instituted, nor over Kansas City, it not being made a party to this suit. The payment, tender, or deposit should be made in that proceeding, and not in this.

I think, therefore, that the complainants are entitled to the injunction they ask, but it will be granted only until the compensation to which the complainants are entitled for the right of way has either been paid or deposited as required by the constitution of the state.

ORDERED ACCORDINGLY.

NOTE.—In England a difference is recognized between the construction of legislative power to condemn lands when conferred upon a railway or other private corporation, and when conferred upon the corporation of a city charged with the duty of making public improvements; in the latter case the House of Lords have held that the powers will not be subjected, as in the former case, to a strict and restrictive construction; but the case shows that parliament, to aid in making public improvements, such as opening and widening streets, confers powers (as, for example, to compulsorily take more land than is necessary, with a view of selling the surplus for profit), which it is not within the constitutional authority of our state legislatures to grant. *Galloway* v. *Mayor, &c. of London*, Law Rep. 1 H. L. 34, 1866. In England "it has become," says Lord Chancellor Cranworth, in the case just cited, "a well settled head of equity, that any company authorized by the legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by injunction of the court of chancery from so doing." In this country, see: *Western Md. Railroad Company* v. *Ownings*, 15 Md. 199: *Browning* v. *Railroad Company*, 3 Green Ch. (N. J.) 47; *Stacy* v. *Vermont Railroad Company*, 27 Verm. 39; *Cosens* v. *Railway Company*, 1 Law R. Ch. App. 594; *Thompson* v. *Railroad Company*, 8 How. (Miss.) 240; *Beasley* v. *Company*, 18 Cal. 306; 27 Cal. 427; *Richards* v. *Railroad Company*, 18 Iowa, 259; High on Injunction, secs, 391–304 and cases cited; Pierce on Railroads, 164; Cooley Const. Lim. 562; *Gray* v. *Railroad Company*, 13 Minn. 315; *Railway Company* v. *Nesbit*, 10 How. (U. S.) 395; Dillon, Munic. Corp. sec. 480; compare *ib.* sec. 476 and cases cited; *Ib.* secs. 727–738.

Borland & Manlove v. Phillips & Scovill.

The defendants, private bankers, received from the bankrupts, who were also private bankers, after the latter had closed their doors for general business, a draft on New York "for collection," and on being advised by their correspondents in New York of its payment there, then paid the full amount thereof to one of the bankrupts: *Held*, if this payment to the bankrupts was made in good faith, without reasonable cause on the part of the defendants to believe that the bankrupts intended to make therewith any fraudulent payments or preferences, that the defendants were not liable to the assignee in bankruptcy under the 35th section of the bankrupt act.

(*Before* Dillon and Delahay, JJ.)

Bankrupt Act.—Section 35 *Construed.*

The plaintiffs are assignees in bankruptcy of Van Fossen & Britton, who were private bankers in Fort Scott. Defendants were also private bankers in the same place. This action is brought to recover $3,000, the amount of a draft or bill of exchange on New York, which the bankrupts, a few days after their suspension, left with the defendants "for collection." The defendants forwarded the draft to their correspondent in New York for collection, and on being advised of its payment there paid the full amount thereof to one of the bankrupts. This draft was received by the defendants for collection after the bankrupts had closed their doors for general business, but within four months of the bankruptcy.

On these facts the plaintiffs sought to recover under the second clause of section 35 of the bankrupt act. On the trial the defendants testified that they received and forwarded the said draft for payment only, and in good faith paid the full amount of the proceeds thereof to the bankrupts. The defendants, although they admitted that they knew the bankrupts had suspended, also testified that they had no knowledge of any intention on the part of the bankrupts to make any improper use of the money thus paid

over to them; and it not appearing that the defendants had reasonable ground to suspect that any fraud was contemplated by the bankrupts, the court gave judgment for the defendants. A motion for a new trial was made by the plaintiffs upon the ground of the newly-discovered evidence of Mrs. Bailey. This motion was denied for the reasons stated in the opinion of the court.

A. A. Harris, for the plaintiff.

McComas & McKeighan, for the defendants.

DILLON, *Circuit Judge.*—If the defendants paid over the proceeds of the draft in good faith, not knowing or having reasonable cause to believe that bankrupts intended to make therewith fraudulent preferences or payments, I still think, as was decided at the trial, that they are not liable to the assignee. Such is the principle on which *Darby's Trustees* v. *Lucas*, 1 Dillon, 164, was decided, and that case has recently been affirmed by the United States supreme court. A motion is made by the plaintiffs for a new trial on the ground of newly-discovered evidence to show that this payment was not made in good faith, but with knowledge that the bankrupts intended to make a fraudulent preference to Mrs. Bailey. Her affidavit is produced, which, unexplained, tends strongly to throw doubts upon the defendants' *bona fides*. But the circumstances mentioned in her affidavit are fully explained by the affidavits of the defendants; and, taking the facts stated in both affidavits together, and assuming that the same facts would be testified to on the new trial, should one be granted, the result would be the same as before.

DELAHAY, J., concurs.

MOTION DENIED.

NOTE.—See, as to suspension of payment by bankers and illegal preferences, *Markson* v. *Hobson*, *ante*.

REPORTS

OF

CASES DETERMINED

IN THE

Circuit Court of the United States,

FOR THE

DISTRICT OF MINNESOTA.

May *et al.* v. Chaffee *et al.*

1. One *joint owner of a patent* for an invention may sell and assign his own share or right in the patent.
2. A grant by a patentee of "the sole and exclusive right to *manufacture and sell* machines of the patented invention" in a specified city, gives by implication to a purchaser from such manufacturer, the right to use the machine until it is worn out, wherever he pleases.
3. To what extent and for what purposes *parol testimony* is admissible in the construction of a grant by a patentee, considered by Nelson, J.

(*Before* Dillon and Nelson, JJ.)

Patent.—The Construction of a Grant to Manufacture and Sell. —Right to Use Patented Article.

The complainants filed their bill in equity in this court, claiming that they are the owners of the exclusive right to use, and to sell to others to use, within the county of Rice, and other counties in the state of Minnesota, a new and useful improvement in stave machines, for which letters pat-

ent were issued Sept. 24, 1861, to William Sisson, of Fulton, New York, and that since they became the owners as aforesaid, the defendants have used, and are still using, in the county of Rice, the said improvement, in disregard of their rights, and without lawful authority. They ask for an account and an injunction against the use of the machine. Two defences are set up in the answer of the defendants: 1. That Sisson was not the first and original inventor; 2. That Fuller & Ford, of the city of Chicago, and state of Illinois, obtained a license from the owners of the patent to manufacture and sell in the city of Chicago, but not elsewhere, the patented machines, and a sale by them to the defendants, at Chicago, of a machine which they are using in Rice county.

The first defence is abandoned, and the defendants rely upon the license of Fuller & Ford for their authority to use the machine.

A statement of the facts, as appears by the pleadings and testimony, is as follows: —

Defendant's title: William Sisson, of Fulton, New York, obtained, on September 24, 1861, letters patent for a new and useful improvement in stave machines, for the term of seventeen years, giving him the exclusive right and liberty of making, constructing, using, and vending to others *to be used*, the said improvement. Sisson, on December 12, 1861, conveyed by deed an undivided half of the said letters patent, and invention, to Clinton H. Sage, of Fulton, New York, reserving certain interests and rights relating to certain places in the state of New York, and not elsewhere, to be held and enjoyed for the full residue of said term for which letters patent were granted. Sisson & Sage, by deed of assignment properly executed, on March 15, 1862, sold to A. A. Jones, of Fulton, New York, the exclusive right under the patent for certain counties in the state of Michigan; and on August 17, 1864, A. A. Jones joins Sisson &

Sage in appointing, by a proper instrument in writing, F. E. Jones, of Chicago, Illinois, attorney and agent to use and sell, and dispose of the right to "use and sell," the patented improvement, and also the right "to sell any territory which has not heretofore been disposed of, in any place or places whatever, and also the right to use the said invention, as to the said F. E. Jones shall seem expedient, giving and granting unto said attorney full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises," &c. By virtue of the authority conferred by this instrument, F. E. Jones, as attorney for Sisson & Sage, granted the sole and exclusive right to Willard M. Fuller and David M. Ford to manufacture and sell the patent stave machines in Chicago, Illinois, and the machine now in use in Faribault, Rice county, Minnesota, was purchased of Fuller & Ford, in the city of Chicago.

Complainant's title: A power of attorney from Sisson & Sage, executed on June 22, 1865, to G. W. Clason, of Milwaukee, to sell rights to use the patented machines in the state of Wisconsin. A sale by G. W. Clason, as attorney for Sisson & Sage, to the complainants, of the exclusive right to use, and to sell to others to use, the invention in certain counties in the state of Minnesota, including the county of Rice. A ratification and confirmation in writing of this sale by Sisson & Sage, dated July 7, 1868.

Brisbin & Palmer, for the complainants.

Gordon E. Cole, for the defendants.

NELSON, *District Judge.*—The whole controversy turns upon the construction and extent of the grant to Fuller & Ford, executed by Jones as attorney for Sisson & Sage. Before considering this instrument with reference to its language, and the rights conferred by it, we will notice an ob-

jection made by the complainants' counsel to the power of attorney to F. E. Jones, to-wit: that A. A. Jones, who it is alleged was an assignee of a portion of the patent and invention, did not execute the grant to Fuller & Ford. It is claimed that A. A. Jones, having signed the instrument, in connection with Sisson & Sage, creating F. E. Jones attorney of all the parties for certain purposes therein expressed, F. E. Jones could not execute an instrument conferring any rights under that power with reference to the patent, without signing the name of A. A. Jones to it. In other words, Fuller & Ford's license cannot properly be received in evidence, because it is not executed pursuant to the power of attorney to F. E. Jones, in that it is only the act of Sisson & Sage, not of the three persons executing the power. Upon what principle this objection is urged does not appear, except as stated in the objection. The power of attorney recites the separate interest in the patent of the parties who executed it, and conferred upon F. E. Jones the authority to act for each of them, jointly or severally. In my opinion, then, a sufficient answer to this objection is, that A. A. Jones is, at the most, a grantee of an exclusive sectional interest, and one of two joint owners can legally grant, assign, license, or sell his own share or right in the patent (3 Blatch. R. 206). The power of attorney signed by Jones, Sisson, & Sage, gave F. E. Jones full power and authority to control any disposition of territorial rights under the patent, and to use the invention as to him might seem expedient. He had the authority from all the parties in interest, and inasmuch as A. A. Jones had no interest in the patent outside of the state of Michigan, he could grant nothing to Fuller & Ford, and it was not necessary for him to execute the assignment to them.

This grant to Fuller & Ford is in the following words: " * * * Now this indenture witnesses that for a valuable consideration, viz: $500, to us in hand paid, the receipt

of which is hereby acknowledged, we, William Sisson and Clinton H. Sage, aforesaid, have assigned, sold, and set over, and by these presents do assign, sell, and set over unto the said Willard M. Fuller and David M. Ford, *the sole and exclusive right to manufacture and sell machines* of the said invention as secured to us by the said letters patent and assignment, *in the city of Chicago*, county of Cook, state of Illinois, *and in no other place*, or places, the same to be held and enjoyed by the said Willard M. Fuller and David M. Ford for their own use and behoof, and their legal representatives, to the full end of the term for which such letters patent have been granted, as fully and entirely as the same would have been held and enjoyed by us had this assignment and sale not been made."

Now the patentee, before the execution of this grant, would, without doubt, by the unrestricted sale of a single machine in Chicago, confer by implication upon the purchaser the right to use it until worn out wherever he pleased. (*Chaffee* v. *Belting Co.* 22 How. 217.) The sale would have transferred the machine outside of the limits of the monopoly. The right to any exclusive privilege under the patent to the machine thus sold would have been gone, and the purchaser, by the tradition of the vendor, would obtain the absolute ownership of it, and it would become his private property.

The complainants insist that this may be true so far as the patentee is concerned, but no such power is given Fuller & Ford by the assignment, and no legal authority to use the monopoly could be conferred upon a purchaser from them, at least to use outside the city of Chicago. The language of the grant to them, it seems to us, clearly gives such authority. The contract entered into by Jones, the attorney, and Fuller & Ford, operated as an assignment of an exclusive right, secured by the letters patent, to manufacture and sell, limiting them, so far as the monopoly was

concerned, to the city of Chicago; the assignment was absolute, within the specified locality, of the exclusive right to manufacture and sell; no restriction of those rights were intended; on the contrary, Fuller & Ford and their representatives were to hold and enjoy them, "as fully and entirely as the same would have been held and enjoyed by Sisson & Sage had this assignment not been made." It seems to us that language could not have been used which would more certainly have given the authority.

Although the subject matter of this contract between Sisson & Sage and Fuller & Ford was a patent, the rule of construction of contracts generally is not thereby altered. An owner of a patent can make an assignment in regard to it the same as he may make in regard to any other species of personal property. Says the court, in *Morse* v. *O'Reilly*, 6 Pa. Law Journal, p. 501: "While the exclusive rights of a patentee are specially guarded from intrusion, the contracts which he makes to share them with third parties are interpreted and enforced in the same manner as other legal engagements."

Applying the usual rules of interpretation to this contract, there can be no doubt about the rights of Fuller & Ford under the patent. They not only had the right to establish a manufactory of machines in Chicago, but they had the exclusive right to sell the machines to any and every one who might choose to purchase the same, the vendee taking all of the rights appertaining to their title as vendors.

If there were any doubts about this view or construction of the instrument, the condition in which we find it dispels them. The original grant to Fuller & Ford is full of interlineations and erasures, and in order to arrive at the true intent of the parties to this grant, these acts of the parties are to be considered. "Words struck out of an instru-

ment may be looked at to ascertain the intention of the parties to it." (3 Met. [Mass.] 93.)

Parol testimony to show all of the circumstances is also admissible when the language may be susceptible of more than one meaning, such as their knowledge of the subject matter of the contract, and all other facts that would throw light upon the intention of the parties. (1 Woolworth C. C. 212.)

In the testimony of Jones and Ford, we find that the right to use the machine in Chicago was of no particular value. Jones had to abandon the only machines that were in use there, because they did not pay. Fuller & Ford had already manufactured machines for Jones, and persons outside, from other states, were applying to them for machines. In the light of these circumstances, it could not have been the intention of the parties to confer only the exclusive right to manufacture machines, and to sell them for use in Chicago, which all parties agree was of no value. Now, there being no restriction in the grant upon the rights thereby conferred, it must be construed in its terms favorable to the grantee and against the grantor. The grant carried with it, by implication, everything necessary and incident to its due enjoyment, and the defendants, when they purchased the machine from Fuller & Ford, had the right to use it without reference to locality, except so far as F. E. Jones was restricted in authority under the power of attorney to him. In arriving at this conclusion, we have sustained the complainants' counsel in all of their objections, except to the admissibility of the record evidence, and overruled the defendants' counsel in his objections to testimony. A decree will be entered dismissing the bill.

DILLON, *Circuit Judge*, concurs.

BILL DISMISSED.

NOTE.—See *Ames* v. *Howell*, 1 Sumn. 488; *Whittemore* v. *Cutter*, 1 Gall. 432; *Ib.* 487; *Brooks* v. *Bicknell*, 3 McLean, 262; *Gayler* v. *Wilder*, 10 How. 495; *Bicknell* v. *Todd*, 5 McLean, 238; *Bloomer* v. *Stolley*, *ib.* 162; *Goodyear* v. *Railroad Company*, 2 Wall. jr. 363; *Suydam* v. *Day*, 2 Blatchf. 230; *Blanchard* v. *Eldridge*, 1 Wall. jr. 339; *Bloomer* v. *McNuman*, 4 How. 553; 22 How. 217; 1 Wall. 340; 2 Woodb. & M. 524; 3 Blatchf. 307; 4 McLean, 275; 7 Wall. 515; 20 How. 198; 4 *ib.* 646; 2 Clifford, 435; 12 Allen, 18; 5 Blatchf. 468; 14 How. 528; 17 *ib.* 447.

Exparte HOLCOMB.

1. It is a criminal act under the legislation of congress (Stats. at Large, 222, sec. 11), *to photograph or execute likenesses of United States treasury notes*, although the similarity between the photograph and the original be not such that it is calculated to deceive the public.
2. Manufacture of coins of *original design* [see note].

(*Before* NELSON, J. *at Chambers*).

Criminal Law.—Counterfeiting.—Photographing United States Securities.

HOLCOMB having been held to bail by a commissioner for having in his possession miniature photographs of United States treasury notes, about the size of a twenty-five cent issue of fractional currency, applied to Mr. District Judge NELSON for his discharge on *heabas corpus*.

Mr. Head, for the relator.

Mr. Davis, district attorney, for the United States.

NELSON, *District Judge.*—The prisoner has been committed, charged with executing a photograph in the likeness of a United States treasury note. The act of congress (13 Stats. at Large, p. 222, sec. 11), enacts "That if any person shall photograph or execute * * any impression

* * in the likeness * * of any obligation of the United States, or any part thereof, * * every person so offending * * shall be punished, etc."

Before the commissioner the government's counsel introduced several photographs in miniature of United States treasury notes, which were found in the prisoner's possession, with blank spaces for the signatures of the register of the treasury and the treasurer of the United States.

The prisoner's counsel insists that this being all the evidence in the case, no crime has been committed, and a discharge should be granted. He urges that the degree of similarity between the photograph and the original treasury note must be such that it is calculated to impose upon mankind in general, which can not be claimed for these photographs.

I agree that in cases of counterfeiting and forgery, where the intent to deceive or defraud enters into and forms a part of the offence, the counsel has stated the true rule. But the offence created by the statute above cited, and with which the prisoner is charged, is the execution of a photograph impression in the likeness of a United States obligation. The making the picture is the unlawful act, and the intent, whether to use, or deceive, or defraud, has nothing to do with the crime.

There is no pretence that the miniature photographs would, in their present form, deceive, but the likeness, that is, the picture, is accurate.

Congress has seen fit to enact many stringent laws in regard to the manufacture of the United States obligations, and has affixed penalties for printing, engraving, and photographing likenesses of any government securities, wrongfully using the plates upon which the originals are printed, and for having the custody and possession of any plate or die which could be used for manufacturing them. These statutory prohibitions are in addition to those punishing the

altering and counterfeiting and forging of all United States securities.

I think these laws have been wisely enacted, for in this case, although the miniature notes may not resemble the originals sufficiently to deceive persons of ordinary intelligence, still they purport on their face to be treasury notes unsigned, and from them impressions could be made, equal in size to the original notes. In this way would they facilitate counterfeiting.

I remand the prisoner to the custody of the marshal, unless he gives bail in the sum of $500.

ORDERED ACCORDINGLY.

NOTE.—*Manufacture of Coins.*—The *making of coins* by individuals, adapted to be used as current money, is prohibited by the legislation of congress. Under the act of June 8th, 1864, prohibiting the making of coins of *original designs* for use as money, it is not necessary that the coins should be of the denomination or resemble the coins authorized to be made by law.

On the subject of the manufacture of coins of original design, the Circuit Judge gave to the grand jury of the circuit court for the district of Kansas the following special charge, at the June term, 1872:—

Gentlemen of the Grand Jury:— For many years prior to 1864 there had been in force an act of Congress prohibiting "The false making or counterfeiting of any coin in resemblance or similitude of the gold and silver coins coined at any mint in the United States." (Act of March 3, 1825, sec. 20). Similar provision was made respecting foreign coin current here.

In 1864, Congress passed a further act, providing that "If any person, except as authorized by law, shall make or pass any coins of gold or silver, or other metal, or alloys of metals, intended for the use and purpose of current money, whether in resemblance of the coins of the United States, or of foreign countries, or of *original design*, he shall be punished by fine not exceeding three thousand dollars, or by imprisonment not exceeding five years, or both." (Act of June 8th, 1864.)

The first statute prohibited only the making or counterfeiting of coin in the *resemblance* or *similitude* of the regular coin of the United States, or foreign coin current therein. The statute of 1864 is much broader in its terms, and declares it unlawful for any unauthorized person "To make or pass any coins intended for the use and purpose of

current money, whether in resemblance of the coins of the United States, or of foreign countries, or of original design."

The meaning of this provision is too plain for controversy. In all countries the subject of coinage is one of governmental regulation. It is so in this country. It is not lawful for private individuals to make coin in the similitude of the government's coin, or of foreign coin current here, even though it should be as pure or worth as much; nor under the act of 1864 is it lawful for private persons to make any coins, whether resembling the government's coin or not, intended for the use and purpose of current money.

To make any coins of a character that they are adapted to be used for the purpose of current money is absolutely prohibited by the legislation of 1864. If coins, made without authority of the government, are in shape, size, and appearance of a character that they are adapted to be thus used, the intention that they should be so used will and should be inferred from the fact of making and disposing of them in a condition that they may be used for the purpose of current money.

Under the statute of 1864, prohibiting the making of coins of *original designs* for use as money, it is not necessary the coins should be of the denomination or resemble the coins authorized to be made and issued by law.

I have been shown by the district attorney some coins of the character of the one I here exhibit to you, and have felt it to be my duty to express my views respecting the meaning of the foregoing statutes of the United States. The sample here shown you bears on the obverse side a female head, with thirteen stars, and date, 1871; on the reverse a wreath with the words, "Half Dollar, Cal." This coin appears to be gold, and is doubtless made of an alloy of that metal, and is intrinsically worth very much less than a half dollar. All of the gold and silver coin of the United States of the present time are nine hundred thousanths fine; that is, nine hundred parts fine metal, and one hundred parts alloy.

A sample of coin like that shown you was recently assayed at the mint of the United States, and found to contain only five hundred and twenty parts in a thousand of pure gold, and although purporting on its face to be worth a half dollar to be in fact of the value of just seventeen cents in gold. This coin is made in imitation of the gold dollar, which is the smallest gold coin issued by law, and is calculated, in my opinion, to deceive and defraud the public, since it professes to be a half dollar in money, coined in California, and is adapted to be used and circulated as money; and it is illegal to make and issue it in this shape, or even to pass it as money.

It is known to the court that you have ignored bills at this term,

charging the offences of making and passing such coin in this state, and the court is bound to suppose that in so doing you were justified by the evidence before you. I do not allude to the subject for the purpose of questioning your action as an independent tribunal; but mainly to prevent the unwarranted inference being drawn by the public that coins of the character I have mentioned can be lawfully made or passed as money. I have felt bound to say this in order that it may be known that whoever engages in business of this kind, whatever the motives or purposes, or however otherwise respectable, violates the law of the land, and incurs the risk of prosecution and punishment.

It is the duty of the district attorney to bring before grand juries all violations of law of this character, and it is one which he will doubtless perform; and after this explicit declaration of what the law on the subject is, offences against it ought not to be viewed by juries with favor or indulgence.

Subsequently indictments were found, and the manufacture of the coins alluded to in the foregoing charge suppressed.

Edward C. Hopkins *v.* St. Paul & Pacific Railroad Company.

The St. Paul & Pacific Railroad Company in not in law the *same corporation* as the Minnesota & Pacific Railroad Company, and cannot be sued at law on the bonds and coupons made by the last named company

(*Before* Dillon, *Circuit Judge.*)

Corporate Succession.—Railroad Charter Construed.

Action at law upon two hundred and seventy coupons, made by the *Minnesota & Pacific Railroad Company*, attached to bonds, dated July 31st, 1858, secured by deed of trust of that date to Farnsworth *et al.* as trustees, but which were delivered to the plaintiff, as alleged, June 1st, 1860.

It is alleged in the complaint that the said Minnesota & Pacific Railroad Company did not construct and put into operation its road from St. Paul to St. Anthony by January 1st, 1862, as required by the act of March 8th, 1861, and

that by reason of this default, and of the act of March 10th, 1862, the lawful corporate name of the maker of the bonds and coupons became changed to that of the *St. Paul & Pacific Railroad Company*, against which judgment is sought on the coupons in suit, on the ground that it is the old corporation acting under a new name.

The action rests upon the proposition that the defendant, the St. Paul & Pacific Railroad Company, is the *same* corporate body formerly known as the Minnesota & Pacific Railroad Company, and hence liable for its debts.

The portion of the answer demurred to sets up the legislative and constitutional history of the Minnesota & Pacific Railroad from its incorporation in 1857 down to the act of March 10th, 1862, under which the St. Paul & Pacific Railroad was organized.

Mr. Masterson, for the plaintiff.

Mr. Davis, for the defendant.

DILLON, *Circuit Judge.*—I have examined the legislative and constitutional history of the Minnesota & Pacific Railroad Company from its incorporation in 1857 down to the act of March 10th, 1862, under which the defendant, the St. Paul & Pacific Railroad, was organized and is acting. The demurrer to the answer presents but one question, viz: Is the defendant the *same corporation* as the Minnesota & Pacific Railroad Company? And this depends upon the act of March 8th, 1861, and of March 10th, 1862, and mainly upon the construction of the latter act.

[Here reference was made to the deed of trust to the state, of November 27th, 1858, and its foreclosure by the state; to the constitutional amendment of April 15th, 1858; to the supplemental deed of trust of November 27th, 1858; to the act of March 8th, 1861, and of March 10th, 1862.]

Looking at sections 1, 2, 9, and 12 of the act of March 10th, 1862, in the light of previous legislation, I am of opinion that it was not the legislative intention to continue the old corporation, but to create a new corporation and to give it the property and franchises of the old corporation, so far as these were held by the state.

Substantially this view was taken in this court by Mr. Justice MILLER, at the June term, 1865, in the case of *McDonnell* v. *The Railroad Company;* and it is the view which has received the sanction of the supreme court of the state in the several decisions referred to by counsel. This is an action *at law*, and it is decisive of it to hold that the defendant is not the same corporate body as the one that made the coupons in suit. This is all that I now decide. What equities, if any, the creditors of the former corporation may have against the existing corporation in respect of property received by it from the state, cannot be considered in this form of action.

JUDGMENT ACCORDINGLY.

NOTE.—Suits in equity in favor of creditors of the old corporations against the new to assert alleged equities in respect to lands, property, and franchises of the old, transferred by the state to the new corporations, have been brought and are now pending in the court.

SCHULENBURG *et al.* *v.* HARRIMAN.

1. *Land grant* to the state of Wisconsin to aid in the building of railroads (11 Stats. at Large, 20), construed.
2. The *legal title* to said lands is in the state in trust for the building of the railroads named.
3. Such lands do not, *ipso facto, revert to the United States*, by mere failure to build the road within the period prescribed in the act of Congress: to effect the forfeiture, some act on the part of the general government evincing an intention to take advantage of such failure is essential.

4. The *state has power* to protect such lands from trespass, and may maintain replevin or trover for logs cut thereon by trespassers.
5. Under the legislation of Minnesota (Rev. Stats. of Minn. p. 250), it is not necessary, to enable the state to maintain replevin where the adverse party has indistinguishably mingled logs cut upon such railroad lands with others bearing the same mark, and especially where he refuses, upon demand made to recognize the right of the state, that the state shall *trace and identify* each log, for which it asks a verdict, to have been cut upon the said railroad lands.
6. *Measure of damages* under the statute in such cases stated.
7. *Stipulation*, in replevin, construed.

(*Before* MILLER and DILLON, JJ.)

Railroad Aid Grant Construed.—Legal Title to the Lands.—Reverter.—Replevin.—Mingling Logs in Boom.—Measvre of Damages.

THIS was replevin for a large quantity of saw-logs, and is one of many similar cases pending in the court. The plaintiffs cut the logs upon odd sections of the lands granted by Congress "To the state of Wisconsin to aid in the construction of railroads in said state," by act approved June 3, 1856 (11 Stats. at Large, 20). This act provided "that the land hereby granted shall be exclusively applied in the construction of the railroad for which it is granted and selected, *and shall be disposed of only* as the work progresses, and shall be applied to no other purpose whatsoever." "That the said lands hereby granted to the state shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other;" and "shall be disposed of by said state only in the manner following — that is to say, a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road, may be sold; and when the governor of said state shall certify to the secretary of the interior that any twenty continuous miles of said road are completed, then another like quantity of land hereby granted may be sold; and so,

from time to time until said road is completed; and if said road is not completed within ten years, no further sales shall be made, and the land unsold *shall revert to the United States.*"

On the 5th day of May, 1864, Congress "extended" the above act of June 3, 1856, "to a period of *five* years from and after the passage of this act," May 5, 1864 (13 Stats. at Large, 66).

On the 10th day of March, 1869, the legislature of the state of Wisconsin passed an act of which the 19th section is as follows: "For the purpose of aiding in the construction of the railway hereby incorporated, the state of Wisconsin hereby grants and transfers unto the said company all the rights, title, interest, and estate, legal or equitable, now owned by the state in and to the lands heretofore conditionally granted to the Saint Croix & Lake Superior Railroad Company for the construction of a railroad and branches; and the said state of Wisconsin does further grant, transfer, and convey unto the said railway company hereby incorporated the possession, right, title, interest, and estate, which the said state of Wisconsin may now have or shall hereafter acquire of, in, or to any lands through gift, grant, or transfer from the United States, or by any act of the Congress of the United States amending 'An act granting a portion of the public lands to the state of Wisconsin to aid in the construction of a railroad, approved June 3, 1856,' and the act or acts amendatory thereof, or by any future acts of the Congress of the United States granting lands to the state of Wisconsin, so far as the same may apply to and in the construction of a railroad from Bayfield, in the county of Bayfield, in a southwesterly direction, to the intersection of the main line of the Northern Wisconsin Railway, from the lake or river Saint Croix to Superior, to have and to hold such lands, and the use, possession, and fee in the same, upon the express condition to construct the herein described

railway within the several terms and spaces of time set forth and specified in the next preceding section of this act; and upon the construction and completion of every twenty miles of said railway, the said company shall acquire the fee simple absolute in and to all that portion of the lands granted to this state, in any of the ways hereinbefore described, by the Congress of the United States, appertaining to that portion of the railway so constructed and completed." (Laws of Wisconsin 1869, p. 972.)

The said railroad, nor any part thereof, has not been constructed by the said railway company; and Congress has passed no act since May 5, 1864, above-mentioned, extending the time for building the road beyond May 5, 1869; nor has it passed an act declaring a forfeiture of the rights of the state under the said acts of June 3, 1856, and May 5, 1864, or declaring that the lands had reverted to the United States by reason of the failure to complete the railroad by the 5th day of May, 1869. The legislature of Wisconsin passed an act to protect these lands from trespassers.

The defendant, Harriman, is the agent of the state of Wisconsin, duly appointed and commissioned, and as such seized logs which had been cut by the plaintiff in 1870 upon said railroad lands; and thereupon the plaintiff brought this action of replevin.

The defendant claimed that the legal title to the logs was in the state of Wisconsin.

The plaintiffs claimed: 1. That the state of Wisconsin had no title to the logs, because the title to the lands from which they came had, before the logs were cut, *reverted* to the United States; and, 2. If the lands had not thus reverted, that the title thereto *was in the said railroad company* by virtue of the above-mentioned act of the state legislature of the 10th day of March, 1869.

Brisbin & McCleur, for the plaintiffs.

C. K. Davis, and *Mr. Spooner*, for the defendant.

On the trial the court ruled the following propositions :—

Per Curiam (MILLER and DILLON, JJ. concurring).—1. We hold that the *legal title* to the lands granted by the act of June 3, 1856, is, by virtue of that act, in the state of Wisconsin, in trust for the building of the railroad.

2. That the lands *had not reverted* to the United States, there having been no judicial proceeding, no act of Congress, and no other act of the general government, to take advantage of the failure to build the railroad or to declare the forfeiture.

3. That the *title to the lands could be disposed* of by the state only in the manner provided in the last section of the aforesaid act of Congress of June 3, 1856, and that the state could not, before the building of the road, divest itself of the legal title to the lands, and that the act of the state legislature of the 10th day of March, 1869, should not be construed as intended to have that effect.

4. That as the legal title to the lands where the logs were cut was in the state of Wisconsin, it had authority to protect them from trespassers, and it would be the owner of logs cut thereon by third persons without authority.

After the testimony was concluded, the presiding justice charged the jury as follows: —

Mr. Justice MILLER.—This is an action of replevin. It is admitted by counsel that the plaintiffs obtained possession of the logs under a writ of replevin. It has been stipulated by the parties that plaintiffs were in the quiet and peaceable possession of the logs before defendant seized them, and that defendant's seizure thereof, as to the manner of making it, was valid and legal.

The stipulation as to the plaintiffs' "quiet and peaceable

possession of the logs" is not an admission by the defendant that the plaintiffs' possession was rightful, or that the plaintiffs were the owners. These questions were left open by the stipulation, and are to be decided by the jury under the instructions of the court.

The presumption arising on the stipulation entered into between the parties is, that the logs were the plaintiffs' property; it makes out a *prima facie* case for the plaintiffs. That is its only effect. It throws the burden of proof on the defendant, to show title or right of possession in himself. The defendant, as the duly commissioned agent of the state of Wisconsin, claims that the logs in dispute were cut on the railroad lands granted by Congress to the state of Wisconsin, by act of Congress of June 3, 1856 (11 Stats. at Large, 20).

The legal title to these lands, and the logs cut thereon without authority, is in the state of Wisconsin. Evidence has been offered by the defendant with a view to show that the plaintiffs cut logs on said lands, and that they were mingled with a large quantity of other logs having the same marks, belonging to the plaintiffs, and were in this condition while in the boom at Stillwater and when seized by the defendant.

The plaintiffs insist that the defendant cannot recover except so far as he *traces and identifies each log* for which he asks a verdict, to have been cut upon the said railroad lands.

However it might be at common law, we instruct you that under the legislation of this state—where the logs were seized by the defendant and replevied by the plaintiffs (Revised Statutes of Minnesota, p. 250) — and the decisions of the courts in the lumber regions applicable to such controversies, that it is not necessary that the defendant should trace and identify each log; that is, if you are satisfied from the evidence that the plaintiffs cut logs on the said railroad

lands, without authority from the state, and that these logs, thus cut, were driven by the plaintiffs down the river into the boom at Stillwater, in this state, and mingled with other logs belonging to them, bearing the same marks, so that the two classes of logs could not be distinguished, then the defendant had at least a right, especially after demand of the plaintiffs, to get from that boom a quantity of said logs equal to those which he shows were cut by the plaintiffs on said railroad lands.

If you find for the defendant, the measure of his damages (under the statute of the state relating to replevin) will be the value of the logs thus traced by the defendant from the railroad lands to the boom at Stillwater, and of which defendant was in possession (as stipulated) when the suit in replevin was commenced.

The Circuit Judge concurs.

NOTE.—Verdict for defendant for $16,809.97, upon which judgment was entered, and a writ of error taken. The other cases, by stipulation, abided the result of this. By the statute of Minnesota, mentioned in the charge, it is provided: "*Sec.* 39. In all cases of wrongful or unlawful taking, detention and conversion of logs or timber, and intermingling the same with other logs and timber so they cannot be identified and separated therefrom by the owner, the rule of the common law applicable to the case of a wrongful and fraudulent confusion of goods, shall govern in determining the right of property in respect to said logs and timber."

"*Sec.* 40. In cases where logs or timber bearing the same mark, but belonging to different owners in severalty, have, without fault of any of them, become so intermingled that the particular or identical logs or timber belonging to each cannot be designated, each of such owners may, upon the failure of any one of them having the possession, to make a just division thereof after demand, bring and maintain against such one in possession an action to recover his proportionate share of said logs or timber, and in such action he may claim and have the immediate delivery of such quantity of said mark of logs or timber as shall equal his said share, in like manner and with like force and effect as though such quantity embraced his identical logs and timber, and no other." (Rev. Stats. of Minn. chap. 32, p. 250.)

Before settling the foregoing charge, the state decisions in Michigan, Wisconsin, and Minnesota, in respect to mingling logs or suffering them to become mingled with others, were examined: *Stearns* v. *Raymond*, 26 Wis. 74.

Construction of congressional land grant in favor of the Union Pacific Railroad Company: See *ante*, p. 310.

UNITED STATES *v.* PRESCOTT.

The *compulsory examination of a bankrupt* under oath cannot be given in evidence against him on a criminal proceeding.

(*Before* MILLER and DILLON, JJ.)

Bankrupt Act.—Indictment.—Evidence.

INDICTMENT under section 44 of the bankrupt act, charging the defendant with disposing of his property with intent to prevent it from coming into the possession of the assignee in bankruptcy.

The defendant had, before being indicted, been compelled to submit to an examination under section 26 of the act, and that examination was reduced to writing and signed by the bankrupt. On the trial of the indictment the district attorney offered in evidence to establish the fraudulent disposition of the property charged in the indictment the above mentioned examination of the defendant in bankruptcy.

Mr. Justice MILLER.—It is our opinion that the evidence offered is not competent. The general rule certainly is that evidence given or statements made by a party under compulsion or order of court tending to criminate himself cannot be put in evidence on a criminal proceeding against him. *Regina v. Garbett*, 1 Denison, Crim. Cases, 236. This case falls within this principle.

DILLON, *Circuit Judge*, concurs.

EVIDENCE EXCLUDED.

STATE OF WISCONSIN *v.* CITY OF DULUTH, THE NORTHERN PACIFIC RAILROAD COMPANY, AND SIDNEY LUCE, Mayor of Duluth.

A *State* cannot maintain as plaintiff an action in the *circuit court* of the United States.

(*Before* MILLER and DILLON, JJ.)

Jurisdiction.—Right of a State to Sue in the Federal Courts.

THE bill in equity of the state of Wisconsin asserts the interest of the state and of her citizens in the navigation of the river St. Louis, from its mouth, where it empties into Lake Superior, at Superior City, for about twenty miles up the river, a part of which, by reason of the expansion of the river, is known as the Bay of Superior, and it alleges that the city of Duluth, and Mr. Luce, the mayor of that city, and the Northern Pacific Railroad Company, are now extending a dyke into the navigable waters of said river, whereby the use of the river for navigation will be seriously obstructed, and the rights of the state of Wisconsin and of her citizens will be impaired. The bill prays for an injunction, and other appropriate relief.

Orton & Setzer, for the state of Wisconsin.

Mr. Stearns, for the defendant.

Mr. Justice MILLER.—The case comes before us at this time for a preliminary injunction, and the defendants raise the question of the jurisdiction of the circuit court, and move to dismiss the bill on that ground.

The question thus presented is whether a state of the Union can maintain a suit in a circuit court of the United States. It is one of interest and of great importance. As we shall presently see, it does not appear to have ever been decided by the supreme court, and has only received

the attention of the circuit courts in two or three reported cases.

It is not claimed in behalf of plaintiff that the jurisdiction can be maintained on the nature of the rights asserted in the bill without regard to the character of the parties, but it is insisted that as one of the states of the federal Union, Wisconsin can sustain any action which can properly be brought in a circuit court.

The constitution, in the second section of the third article, declares that the judicial power shall extend to controversies between a state and citizens of another state, and as the defendant Luce and the city of Duluth are undeniably citizens of the state of Minnesota, the case in that respect comes within that provision of the fundamental law.

The succeeding clause, however, of the same section, in defining the jurisdiction of the supreme court, the only court established by the constitution, uses language which cannot be disregarded in this connection. It says that in all cases affecting ambassadors, other public ministers and consuls, and those in which a *state shall be a party*, the supreme court shall have original jurisdiction. In all *other* cases before mentioned, it shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

As this is a case in which a state is a party, the supreme court undoubtedly has original jurisdiction of it, if it is one to which the power of the federal judiciary extends; and this jurisdiction it has without the aid of any act of Congress, for it is conferred in clear and express terms by the constitution. Nor is this affected by the eleventh amendment to the constitution, for that only protects the states from suits commenced or prosecuted *against* them when brought by citizens of another state, or of a foreign state. It may, therefore, be safely affirmed that the supreme court would have jurisdiction of this suit, so far as the character of the

parties can give it, if brought in that court. *Pennsylvania* v. *The Wheeling Bridge Company*, 13 How. 518.

As that court has original jurisdiction of such suits, it would seem that it cannot have in any such case appellate jurisdiction. The section in the constitution which confers it as original is followed by the declaration that in all *other* cases before mentioned the supreme court shall have appellate jurisdiction. Did the framers of the constitution intend to give to the supreme court both an original and appellate jurisdiction in the same class of cases founded in the character of the parties? Or did it by this clause intend to define the cases in which it should have original, and those in which it should have appellate, jurisdiction, and to distinguish and separate them from each other? The natural import of the language used, defining specially the cases in which it has original jurisdiction, and declaring that in all others its jurisdiction shall be appellate, favors very strongly the idea that in those classes of cases of which it has original cognizance, it can have no appellate jurisdiction. If this be a sound exposition of the constitution, it follows that if there is in the circuit courts a jurisdiction concurrent with the supreme court in cases to which a state is a party, no appeal or writ of error can be taken when the suit is brought in the former. This would be an anomaly in our system of jurisprudence, which stands alone, and it weighs very heavily against a construction of the act of Congress creating the circuit courts, and conferring their powers, which brings such cases within their jurisdiction by mere implication.

But waiving this view of the subject for the present, these propositions may be fairly deduced from the constitution in regard to suits brought by a state against citizens of another state:

1. That the judiciary power of the federal government extends to such cases.

2. That the supreme court has original jurisdiction of such cases.

3. That jurisdiction is conferred on no other court of such cases by the constitution *propria vigore*.

Conceding, then, that the jurisdiction of the supreme court as derived from the constitution is not exclusive in this class of cases, we must still look to some other source of authority than that instrument when a concurrent jurisdiction is claimed for some other court. It may also be conceded, and perhaps that is the established doctrine, that the states have lawfully conferred such a power on their own courts when exercised on persons or property within their territorial limits, and that to this extent such a concurrent jurisdiction exists. But when it is claimed for any other federal court than the supreme court, the power must be found in an act of Congress.

It is a proposition which admits of no further debate, and needs the citation of no authorities at this day, that all courts of the United States, except the supreme court, being the mere creatures of congressional statute, can exercise no jurisdiction but such as is given by those statutes; and even the supreme court is limited in all except the original jurisdiction given it by the constitution — a very small portion, indeed, of the power which it exercises — by the will of Congress as expressed in its legislation.

We turn, then, to the act of 1789, establishing the judiciary system of the United States, to which alone we can look for the requisite authority; for though there are many subsequent statutes conferring jurisdiction on the federal courts, there are none which can affect the question before us.

The fourth section of that act creates the circuit courts, and the eleventh defines their powers, and confers their jurisdiction. The latter declares that they shall have original cognizance, concurrent with the courts of the several states,

of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the *United States are plaintiffs, or petitioner, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state.*

This is all that is to be found in this section conferring jurisdiction on the ground of the character of the parties, and we look here in vain for any jurisdiction where a state is a party. I do not know if the idea has ever been advanced that a state is a mere aggregation of its own citizens, and therefore has the same right to bring suit that any one of its citizens has. It has not been asserted by counsel in the case before us. It certainly cannot be maintained upon any sound view of the constitution. If the word state is used in that sense in the constitutional provision, it is useless, because there is the provision that the judicial power extends to controversies between citizens of different states, and if a state is but the aggregate of its citizens, then the other is unnecessary.

The clause in that instrument conferring original jurisdiction on the supreme court in cases where a state is a party, certainly does not confer jurisdiction when citizens of different states are parties. In view, then, of the constitutional foundation on which alone a state can be a party in the federal courts, no such construction of the statute defining the jurisdiction of the circuit court can be sound.

A like conclusion results from an examination of the thirteenth section of the judiciary act. It declares that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. Now, in all these cases Congress make sa very clear distinc-

tion between a state and its citizens, and it denies to the supreme court any original jurisdiction between a state and its own citizens, and confers on it jurisdiction original but not exclusive, as between a state and citizens of other states. This latter is the precise class of cases to which the one before us belongs; and it would be a violation of all sound rules of construction to say that the same jurisdiction exactly is conferred on the circuit court, by using the phrase, "controversies between citizens of different states,"—a phrase applied both in this statute and in the constitution to a very different class of controversies from the case under consideration.

This precise question was raised in the case of *Osborne* v. *The Bank of the United States*, 9 Wheaton, 841, in which the jurisdiction conferred by the constitution, where a state is a party, is held to apply only where a state in its corporate or sovereign character is by name an actual party to the record.

It is argued, however, that inasmuch as the constitution, in conferring original jurisdiction in this class of cases on the supreme court, did not make that jurisdiction exclusive, and the thirteenth section of the act of 1789 declares expressly that it shall not be exclusive, that the concurrent jurisdiction which is thus implied to be or remain in some other court must be in the circuit court. It would be a sufficient answer to this to say that if it must necessarily be in a court of the United States, it might as well be sought in the district court as in the circuit court, for there is nothing in the statute defining the jurisdiction of either of those courts which refers to this jurisdiction, even by implication.

But even if the language of the thirteenth section of the judiciary act does imply a concurrent jurisdiction in some other court, we have already seen that such a jurisdiction exists now, and has always probably existed in the state courts. And the probability that it was to this that the

thirteenth section had reference is the stronger, because in many other cases that statute recognizes, both in express terms and by fair implication, such a concurrent power in the state courts with those of the United States. Such is the case with the great body of the jurisdiction of the circuit courts in regard to aliens, citizens of different states, and suits brought by the United States. So, also, of admiralty courts, where the common law furnishes a remedy, and other grounds of jurisdiction of the district courts mentioned in the ninth section of the same statute.

There is every reason, therefore, to infer that Congress in declaring that the original jurisdiction of the supreme court in this class of cases shall not be exclusive, had reference to the jurisdiction over the same class of cases intended to be left with the state courts, and which, as we have already seen, they have uniformly and constantly exercised without objection. But if Congress can confer on the circuit courts an original jurisdiction in this class of cases, concurrent with that of the supreme court, it is a sufficient answer to say that it has not done it. And in the face of the fact that Congress has not in any other instance whatever, during a period of over eighty years that the government has existed, attempted to confer on those two courts a concurrent jurisdiction, is an argument of great force against implying such exercise of the power, in the absence of words expressly granting it. It would indeed be curious if, when the constitution which gave so limited an original jurisdiction to the supreme court, made a suit brought by a state against citizens of another state, one of that limited number, Congress had conferred the same jurisdiction on an inferior tribunal without an appeal to the former.

Looking at the question which we are considering as it may be affected by the authority of judicial decisions, we have been unable to find, with the limited opportunity which the exigency of this case gives for investigation, any

case in which it has been decided that such jurisdiction exists in the circuit court.

Some reference is made to the remarks of the supreme court, and in the dissenting opinion of the Chief Justice in the *Wheeling Bridge* case, 13 How. 18, which are supposed to favor such a doctrine. But no such question was before the court, and both the Chief Justice and Justice McLean said nothing more than that the merits of that case, which was an original suit in the supreme court, must be governed by the same rules of law as would govern the circuit court of the district of Virginia, if the case was pending before it; but it does not appear that the question whether the case with such parties could be sustained in that court had occurred to their minds. Such a suit, brought by the state of Indiana, was tried by Mr. Justice McLean in the circuit court, without the question being raised. It is the case of *Indiana* v. *Miller*, 3 McLean, 151, and was removed by consent from the state court and the facts stipulated for the judgment of the court on the case. No thought seems to have been given, either by the court or counsel, to the question of jurisdiction.

On the other hand, we have the judgment of the circuit court for the district of Georgia, as stated by Judge Iredell, in the case of the *State of Georgia* v. *Brailsford*, 2 Dallas, 402. The case, as reported in Dallas, was a suit brought in the supreme court by the state of Georgia, by a bill in chancery. Judge Iredell, in his opinion, says that in a suit about the same subject matter before him in the circuit court, he had refused to permit the state of Georgia to intervene, because the circuit court could have no jurisdiction of a case in which a state was a party. He had, then, at that early day, decided this question; and though Mr. Justice Wilson thought it was error, he gives no reason for it which at this day would have any weight.

The case of *Gale* v. *Babcock*, 4 Washing. C. C. R. 199, is

also directly in point. Mr. Justice WASHINGTON, in that case, remanded it to the state court, on the ground that the circuit courts had no jurisdiction of a suit to which a state was a party. And in a very recent case reported in 5 National Bankrupt Register, 466, the circuit court of North Carolina decided the same way. These three are all the direct decisions we have found, and they all deny the jurisdiction.

We are well satisfied that such is the sound construction of the constitution and the acts of Congress bearing on the question; and we have the less reluctance in dismissing the bill, as we must for want of jurisdiction, in this court, because we have no doubt that both the state courts of Minnesota and the supreme court of the United States are open to the state of Wisconsin for such relief as she may be entitled to.

DILLON, *Circuit Judge*, concurs.

NOTE.—A similar bill was afterwards filed by the state of Wisonsin in the supreme court of the United States, but the controversy is said to have been subsequently adjusted.

As to the former bill by the United States, see 1 Dillon, C. C. R. 469.

SMITH v. POMEROY.

1. *Decrees and judgments* of courts of general jurisdiction are presumptively regular.
2. If the court pronouncing a decree had jurisdiction to render it, such decree can not be *collaterally impeached.*
3. What is requisite to confer jurisdiction over the property of *absent mortgagors* in bills to foreclose, considered, and the statute of the territory of Minnesota on that subject, construed.
4. Titles acquired under sales upon decrees of foreclosure, where the court rendering the decree had jurisdiction, can not be collaterally impeached for errors or irregularities in the proceedings in the cause in which the decree was rendered.

(*Before* Dillon and Nelson, JJ.)

Absent Defendants.—Publication.—Jurisdiction.—Titles Under Decrees.

This was an action of ejectment tried to a jury. It was one of numerous cases brought to test the title to the property in "Lambert & Co.'s addition" to St. Paul. The facts appear in the charge of the court.

E. C. Palmer, *Officer & Chittenden*, for the plaintiffs.

Gilfillan & Williams, *H. J. Horn*, *Geo. L. Otis*, *& M. Lamprey*, for the defendant.

Dillon, *Circuit Judge.*—This is an action of ejectment for lots 1, 2, and 3, in block 1, in Lambert & Co.'s addition to St. Paul. Both parties claim title under Charles K. Smith, who died intestate on the 28th day of September, 1866. The plaintiffs have been admitted on the trial to be his heirs at law, and upon the documentary evidence introduced are entitled to recover unless the title of their ancestor has been divested by the foreclosure proceedings of one Vetal Guerin against the said Charles K. Smith, set up in the answer. It is under these proceedings that the defendant claims title to the lots in controversy; and the question in the case is whether the right of the said Smith was foreclosed by a valid decree, and the title to the premises vested in the purchaser by a valid sale under such decree.

Record evidence has been introduced, showing that on the 25th day of February, 1851, Vetal Guerin, being the owner of ten acres of land, now in the city of St. Paul, and since platted under the name of "Lambert & Co.'s addition" to the city, conveyed the same to Charles K. Smith, above named (the ancestor of the plaintiffs), and that Charles K. Smith on the same day executed a mortgage to Guerin,

dated February 25th, 1851, to secure the sum of $200, due May 12th, 1851, which mortgage was duly recorded.

It is this mortgage which the defendant avers was subsequently foreclosed, and under which, it is claimed, the mortgaged property was sold by virtue of the foreclosure decree. These foreclosure proceedings are asserted to have taken place in the district court of the territory of Minnesota, for the county of Ramsey, in which the land in controversy is situate; and to show the fact of the foreclosure the defendant has introduced certain record evidence of proceedings in that court in 1851 and 1852 in a suit entitled "*Vetal Guerin* v. *Charles K. Smith*," and certain oral evidence to show the loss of other portions of the records in said cause, and a deed purporting to have been made by a master under the decree rendered therein.

By the statute then in force that court was a court of general chancery jurisdiction. (Rev. Stats. of Minnesota, 1851, chap. 94.) This statute prescribed in detail the mode of exercising chancery jurisdiction generally, and contained special provisions respecting the "powers and proceedings of the court of chancery touching the foreclosure of mortgages."

It prescribed, among other things, the mode of proceeding against absent defendants, in substance that "In case of a bill filed against any defendant, against whom a subpœna or process to appear shall issue, who shall fail to enter his appearance, and it shall be made to appear, by affidavit or otherwise, to the satisfaction of the judge, that the defendant is out of the territory, the judge may by order direct such defendant to appear, plead, answer, or demur to the bill at a day to be fixed, not less than three nor more than six months from the date of the order, which order may be published in a newspaper for six weeks; and in case the defendant shall fail to appear and plead within the time limited, on proof of the publication of the order to the satisfaction of

the judge, the judge may order the bill to be taken as confessed, and render a decree as therein provided." (Rev. Stats. 1861, p. 463, sec. 15; *Ib.* 468, sec. 57.)

The statute then in force contained this provision: "The clerk must keep among the records of the court a *register of actions;* he must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein." (*Ib.* p. 421, sec. 40.)

It also contained a provision that "It shall not be necessary to enroll any decree in a court of chancery, but immediately after any decree shall have been pronounced, the bill, answer, and all other proceedings in the cause shall be attached together by the clerk and filed in his office," &c. (*Ib.* p. 465, sec. 32.)

On this trial the original book called the "Register of Actions" has been introduced in evidence, and in relation to the suit of *Vetal Guerin* v. *Charles K. Smith*, contains entries showing that the bill of foreclosure was filed November 8th, 1851; that two subpœnas were returned by the sheriff that Charles K. Smith was not found, the one November 15th, 1851, the other December 15th, 1851; that an affidavit for an order for publication was filed as follows: Ordered that "Charles K. Smith appear, plead, answer, or demur to the complainant's bill filed in this cause by the 1st day of April next," and that "this order be published in the *Minnesotian* six weeks successively, at least once each week. Dated, St. Paul, December 22d, 1851. Jerome Fuller, Chief Justice." It has been proved by the production of the original files of the *Minnesotian* from the state historical society that this order was published for the required length of time.

The register of actions also contains the entry of an order of the chief justice, filed April 3d, 1852, that the bill be taken as confessed, and an order of reference by the clerk as master; that the master made his report, which was filed

May 10th, 1852, finding the sum of $213.92 due the complainant. It also contains the following entries: "Decree filed May 20th, 1852; report of sale filed August 10th, 1852; final decree confirming sale and ordering distribution of surplus filed September 3d, 1852."

The clerk and deputy clerk who made the entries in this register are both alive and have been examined as witnesses before you on this trial, and testify that after thorough search they cannot find the original files or papers in this foreclosure suit; that the orders and decrees of the court were never entered of record in any book, but were filed away at the time as the statute directs.

The clerk has testified that he recollects that the bill in the said suit was to foreclose the mortgage from Smith to Guerin, before mentioned; and that he knew a decree of foreclosure was rendered and signed ordering a sale of the mortgaged premises by the clerk as master; that Lambert was the purchaser; that the sale was reported, and that an order was made and signed by the judge confirming the sale. A deed by the master to Lambert, dated August 10th, 1852, reciting the decree and sale and conveying the property, is also in evidence.

Now, if you believe from the evidence that the bill in the said suit of *Vetal Guerin* v. *Charles K. Smith* was one to foreclose the said mortgage of February 25th, 1851, embracing the lots in controversy; that an order for publication was directed by the chief justice of the court; that the order appearing in the files of the *Minnesotian* was published for six weeks, respecting which last fact there is, indeed, no controversy; that subsequently a decree of foreclosure was rendered by the judge ordering a sale of the mortgaged premises by the clerk as master; that the clerk sold the premises, though he failed to publish notice of said sale in more than one newspaper; and that the sale was reported to the court and a final decree ordered, confirming the sale

and ordering a distribution of the surplus; and that the master made the deed of August 10th, 1852, introduced in evidence,—then we instruct you that the effect of this foreclosure proceeding, sale, and deed was to divest the said Charles K. Smith of title to the mortgaged premises, and consequently the plaintiff, as his heirs-at-law, cannot recover in this action.

The court in which these proceedings were had was a court of original and general jurisdiction in chancery, and if it rendered a decree of foreclosure of the said mortgage the presumption is both that it had jurisdiction to render such a decree, and that its proceedings were regular.

The presumption of jurisdiction arising from the fact that a decree was rendered is not conclusive, but may be rebutted; and if it appears that it had no jurisdiction of the subject matter or the party defendant, its decree and all acts under it would be void.

Where a decree of foreclosure is rendered, and a sale of property has been made thereunder, it can not be attacked collaterally, and the title thus acquired overthrown, except on the ground that the court rendering the decree had no jurisdiction. If it had jurisdiction, no irregularity and no error in the exercise of such jurisdiction can effect the title of a purchaser under the decree, even though the error or irregularity may be such that a revisory court on appeal would have reversed the decree.

The district court of the territory of Minnesota confessedly had jurisdiction of suits to foreclose mortgages upon lands within the county where the court was being held.

What would confer jurisdiction upon the court to render a decree of foreclosure? Under the statute in force at the time, and before referred to (Rev. Stats. 1851, chap. 94), we answer this question as follows:—

First. There must be filed in the court a bill of complaint, describing the mortgage sought to be foreclosed, the

mortgaged premises, and making the mortgagor a defendant. This is necessary to call the judicial power into exercise.

Second. A subpœna or process must issue against the defendant, and be served upon him; or, if he was out of the territory or could not be found therein, the judge must make an order requiring the absent defendant to appear therein, which order must be served personally on the defendant, or be pulished in one or more newspapers in the territory, as required by statute, and the order of the judge (Rev. Stats. 1861, p. 453, sec. 14), but if such personal service or publication be made, and proof thereof be made to the proper judge or court, such court or judge has jurisdiction to render a decree thereon.

The court, or under this statute the judge, was authorized to determine whether the service or publication had been made, and its sufficiency and such determination, though erroneous, can not be revised in a collateral proceeding by another court, but such determination must stand and be respected until it is reversed or set aside in some direct proceeding.

A distinction must be borne in mind between a case where there is no service or no publication, and one which is defective, but which the proper court has adjudged to be sufficient, and upon such an adjudication rendered a final decree in the case.

These principles, so essential to the stability of judicial titles, have had the sanction of the supreme court of the United States, and have been vindicated and enforced with great clearness and strength of reasoning in several of its published judgments. *Voorhees* v. *Bank*, 10 Pet. 449, and cases cited; *Cooper* v. *Reynolds*, 10 Wall. 308.

Views not in harmony with these have, we are aware, been sometimes held; but their undoubted effect is to encourage the picking of flaws in deeds and judicial proceed-

ings in which confidence has been long reposed, thereby promoting litigation and precipitating upon the community all of the manifold evils of insecure titles. It is, in our judgment, a misfortune to any state where these views receive judicial sanction, and especially in the new states where property is rapidly advancing in value, as exemplified by the case in hand, in which ten acres of unimproved land, worth in 1852 about $700, is soon after platted into lots, which are now covered with valuable improvements, made by purchasers in good faith, and worth fifty or perhaps an hundred times that amount.

NELSON, J. concurs.

NOTE.—There was a verdict and judgment for the defendant.
As to jurisdiction and collateral attacks on decrees and judgments *Salisbury* v. *Sands*, *ante*; *Isaacs* v. *Price*, *ante*.

THE LOGANSPORT GAS LIGHT AND COKE CO. *v.* ALFRED H. KNOWLES AND THOMAS HARVEY.

Where, in an action on a judgment recovered in a sister state, the record showed the issuing of the summons, and the return of service thereof by the sheriff upon the defendant personally, *held*, that the defendant could not, when called as a witness, contradict the record, and show that he was not personally served with the summons.

(*Before* NELSON, J.)

Debt on Judgment of a Sister State—How far Recitals in Record Conclusive.

THIS was a suit upon a judgment obtained in a circuit court of the state of Indiana against Knowles and Harvey.

A complaint was filed against John W. Bain, Knowles, and Harvey, on the 18th day of September, 1865, for the Febru-

ary term of said court in 1866. A summons was issued on that day, and the judgment record recites, "That on the 15th day of March, 1866, being the 16th judicial day of the February term, the defendants, Knowles and Harvey, though each three times called, come not, but herein wholly make default; and the plaintiff now shows to the court, by the return of the sheriff of Cass county upon the writ of summons issued in this behalf, that said Knowles and Harvey were duly served with process to appear in the action, more than ten days before the present term of this court," etc. The return of the sheriff endorsed on the summons is in these words, to-wit: "I do hereby certify that I served the within writ on the 19th day of September, 1865, upon Alfred H. Knowles and Thomas Harvey, personally, by reading the same to them; and I further certify that John W. Bain cannot be found within my bailiwick. John Davis, sheriff Cass county; by James Stanley, deputy." The record further states, after several continuances, that on the 13th day of December, 1870, the court, "hearing plaintiff's proofs and allegations herein, doth find that the defendants, Alfred H. Knowles and Thomas Harvey, are indebted to the plaintiff in the sum of seven thousand eight hundred and fifty dollars ($7,850)," etc.

On the trial in this circuit, the defendants were offered as witnesses to prove that they had not been served personally with process. An objection to this offer was sustained, and the plaintiff finally obtained judgment. A motion for a new trial is now made by the defendants.

Cornell & Bradley, for the plaintiff.

Bigelow, Flandrau & Clark, for the defendants.

NELSON, *District Judge.*—The only point which will be considered upon the motion for a new trial, based upon a

bill of exceptions in this case, is that wherein it is alleged the court erred in not permitting the defendants, who were offered as witnesses, to contradict the judgment record, which record states the fact of a personal service of the summons upon both of the defendants by the sheriff, and contains a copy of the summons, and of the return of the officer. All of the facts necessary to give the Indiana court jurisdiction of the persons, and of the subject matter, are fully stated in the record.

The defendants' counsel claim that the question raised being a jurisdictional one, they have the right to contradict the fact of a personal service of process, although it is so stated in the judgment record.

The constitution of the United States, article 4, section 1, declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings be proved, and the effect thereof." By authority of this section, Congress has enacted that, "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law and usage in the courts of the state from whence the said records are or shall be taken."

I have had some difficulty in satisfying my mind as to the extent to which it was intended to give effect to the judgments of sister states by this act of Congress. The authorities are conflicting upon the subject, and there is no adjudication of the supreme court of the United States in a case like the one in hand. True, there is a statement in the case of *Shelton* v. *Tiffin*, 6 Howard, 163, which would seem to foreshadow the opinion of the court at that time, that a personal service of process, or personal appearance in court and waiver of process, when contained in the record, can-

not be controverted; but in *Christmas* v. *Russell*, 5 Wallace, 305, it is said that "They (judgment records of sister states) are open to inquiry as to the jurisdiction of the court and notice to the defendant." In the state courts there is great confusion upon the subject. The case of *Murray* v. *Starbuck*, 5 Wend. 148, is the leading one relied upon to sustain the position taken by the defendants' counsel, and seems to have been followed very generally in the New York courts. The reasoning of Judge MARCY in this case was criticised and rejected by the late Justice McLEAN (see *Lincoln* v. *Tower*, 2 McLean, 473), and by the supreme court of the state of Michigan (see *Wilcox* v. *Kassick*, 2 Mich. 165); but in many of the states it has been followed and approved. In order to properly understand the decision given in *Murray* v. *Starbuck*, it is necessary, in my opinion, to examine the law and practice existing at that time in the state of New York in regard to the manner of making up the judgment record; for this practice undoubtedly influenced the court in its decision. It will be found, upon examination, that, by the practice in the courts of that state, the attorney of the prevailing party prepared the judgment record out of court, after the suit had terminated; and the entries were made by him, and not by a particular officer in court. The supervision of the court over the whole course of action was not required by this practice, and the entries, therefore, in a judgment record were such as the attorney saw fit to insert, although by a fiction everything was supposed to be entered in open court. (See Graham's Practice, Burrill's Practice, title "Judgments in General," etc.) There was very good reason, therefore, for permitting a defendant in a suit upon a judgment rendered in the courts of that state to contest any jurisdictional fact, even to the extent of contradicting the statement of personal service of process, or any fact which showed jurisdiction of the person. The record in all its parts was the act of the attorney,

and did not bear the impression of absolute verity. It is true this case (*Murray* v. *Starbuck*), goes to the full extent of deciding that, notwithstanding the record, any jurisdictional fact may be inquired into; but to my mind it is clear that Judge MARCY had in view the practice with which he was most familiar, and what he said had reference to the *status* of judicial records similarly situated to those of the state of New York.

The authorities compiled by Mr. Bigelow in his excellent work on "Estoppel," seem to me to justify the conclusion laid down by him, viz: "If the allegations in the record as to jurisdiction could not be disputed in the sister state, they must be conclusive throughout the Union," and "We should state the rule to be, that where the record contains an allegation of specific facts sufficient to constitute jurisdiction, parties and privies are estopped to deny the jurisdiction in a suit for the same cause of action, unless the record would be inconclusive in an action upon the judgment in the state in which it was rendered." (Bigelow on Estoppel, page 287, and preceding title, "Foreign Judgments *in personam*.") In Indiana, this record would be conclusive between the parties without doubt. (23 Indiana, 628; 2 Blackf. 108.) A case on all fours with the one at bar has been decided in that state, upholding the conclusiveness of the judgment of a sister state, where the record alleges personal service of summons. (*Westcott* v. *Brown*, 13 Indiana, 83, explaining *Boylan* v. *Whitney*, 3 Indiana, 140, cited by defendants' counsel; see, also, *Roberts* v. *Caldwell*, 2 Dana, 512; 3 Gilman, 197.)

The defendants, therefore, in my opinion, are not entitled to a new trial.

MOTION DENIED.

UNITED STATES v. HALL *et al.*, Plaintiffs in Error.

The discretion of the secretary of the treasury, under the 25th section of the internal revenue act of June 30, 1864, as to making *allowances to collectors*, in addition to their fixed and regular compensation, cannot be judicially revised; and the courts cannot make allowance to the collector for items and charges which the secretary has rejected.

(*Before* DILLON, *Circuit Judge.*)

Internal Revenue Collector's Compensation.—Discretion of Secretary of the Treasury as to Allowances.—Act of June 30, 1864, *Section* 25, *Construed.*

WRIT of error to the district court. Hall was collector of internal revenue from 1862 until 1866. This is a suit upon his official bond. He claims to be allowed $5,010 for the pay of sixteen deputies and for clerk hire. Section 25 of the act of June 30, 1864 (13 Stats. at Large, 231), governs the case. The treasury department rejected the claim. It was proved that Hall had made the payments to the deputies and clerks, that they were reasonable, and that similar claims had before been allowed to him by the department in his accounts. The district court decided against the defendants, who bring a writ of error to this court.

Woolfolk & Brown, and *James Gilfillan*, for the plaintiffs in error.

C. K. Davis, district attorney, for the United States.

DILLON, *Circuit Judge.*—The act of June 30, 1864 (sec. 25), fixes the compensation of collectors, and declares that the amount shall be "in full compensation for their services and that of their deputies," * * "*provided*, that the secretary of the treasury shall be authorized to make such further allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district or from the amount of internal duties collected, or from

other circumstances, it may seem just to make such allowances." It is on this proviso that the defendants rely. But I am of opinion that it invests the secretary of the treasury with authority to be exercised according to *his* discretion or judgment; that the law assumes that this will be justly exercised, of which the collector must take the risk, if he acts without precedent authority from that officer or the proper department; and that the judgment of the secretary of the treasury in respect to the allowances he is therein authorized to make cannot be judicially revised. There is nothing in the cases of *United States* v. *Wilkins*, 6 Wheat. 135; *United States* v. *MacDaniel*, 7 Pet. 1; *United States* v. *Gratiot*, 15 Pet. 336, upon which the defendants rely, in conflict with the above view, since this case turns solely upon the meaning of section 25 of the act of June 30, 1864. If the facts stated in this record be true, the case of the defendant presents strong grounds for relief, but this must come from the secretary of the treasury, under the act, or from Congress. The judgment below is accordingly affirmed.

AFFIRMED.

NOTE.—As to compensation of public officers, see *United States* v. *Lowe*, 1 Dillon, 585.

PAYSON, Assignee, etc., *v.* STOEVER.

1. Under the bankrupt act, the right to enforce the liability of stockholders with respect to their unpaid stock passes to the assignee; and this is the case with the Republic Insurance Company under its charter, whose assignee in bankruptcy may enforce such liability so far as necessary to pay losses and all other debts provable against the company.

2. The bankruptcy court has authority to make an assessment upon the stockholders, and its action in so doing cannot be collaterally assailed in suits to enforce the collection of the assessment.

3. By the charter of the Republic Insurance Company, its capital stock was fixed at $1,000,000, with authority to increase the same to $5,000,-000 at the discretion of the stockholders: *Held*, 1. That the charter contemplated that the increase of stock should be made by the *stockholders*, and that the *directors* had no authority under the original charter to make the increase; but it was also *held*, 2. That no formal vote of the stockholders to increase the stock was necessary; and, 3. That the requisite assent of the stockholders might be shown by their conduct and acquiescence, and that in this case it was thus shown by the facts stated in the opinion of the court.

4. The amended charter authorizing the directors to increase the capital stock—the stock never having been increased beyond the amount authorized in the original charter—did not have the effect to discharge a non-assenting stockholder from his liability upon his unpaid stock.

(*Before* DILLON and NELSON, JJ.)

Bankrupt Act.—Stockholder's Liability.—Rights and Power of Assignee.—Construction of Charter of the Republic Insurance Company.

THIS action is brought by the plaintiff, the assignee in bankruptcy of the Republic Insurance Company of the state of Illinois, against J. C. Stoever, to enforce the collection of an assessment of sixty per centum upon the par value of ten shares of stock in said company, of which he is alleged to be the holder and owner.

The company was adjudged a bankrupt on a creditor's petition by the district court of the United States for the northern district of Illinois, November 14, 1872, and the plaintiff was duly appointed assignee in bankruptcy, and a conveyance was made December 18, 1872, to him by the register under the 14th section of the bankrupt act.

The assignee filed in the bankruptcy court a petition for assessment upon the unpaid stock of the stockholders De-

cember 30, 1872, and, after due consideration of the same, the court, in February, 1873, ordered, adjudged, and decreed that an assessment be made upon the capital stock and stockholders of sixty per centum of the par value of said stock.

The company was chartered February 15, 1865, by the legislature of Illinois, with a capital stock of $1,000,000, with authority to increase the same to not exceeding $5,000,000 at the discretion of the stockholders. This charter was subsequently amended (March 25, 1869), providing, among other things, that "The board of directors shall have power to increase the capital stock of said company from time to time in their discretion."

The board of directors, January 9, 1868, voted to increase the capital stock of the company, by resolution, to $5,000,000, but at no time during the existence of the company was that amount of stock issued.

The defendant held a certificate for ten shares of stock, dated November 8, 1868, reciting the payment thereon of twenty per cent. It is admitted that the shares owned by him were not part of the $1,000,000 first issued, but were part of stock issued in excess of this amount.

At an annual and regular meeting of *stockholders*, January 13, 1869, a report was submitted, showing that $3,746,000 of stock had been issued at that time, and at this meeting $3,116,000 of stock was voted for directors, of which stock so voting $804,600 was represented out of the first $1,000,000 issued. This meeting was the regular annual meeting of the stockholders provided for by the by-laws of the company, which by-laws were adopted January 8, 1868, by the directors, and not by the stockholders of the company. The defendant received two dividends on the 10th of February, 1870, of $10 each, upon the stock owned by him, but never had, as he testified, any knowledge that

the capital stock of the company had been increased beyond the $1,000,000, or that the charter had been amended.

On all the stock issued the company declared four five per cent dividends, as follows: June 30, 1868; January 13, 1869; July, 1869, and January, 1870.

The whole amount of stock issued by the company before its failure was $4,900,000. At the time of the amendment of the charter, in March, 1869, the company had then issued stock to the amount of $4,459,300.

The bankruptcy of the company was occasioned by the great Chicago fire in October, 1871, in which it had risks and sustained losses to the amount of nearly $3,000,000.

The cause was tried to the court. The defendant's counsel rest the defence upon substantially three grounds: —

1. That under the bankrupt act no right to enforce the liability of stockholders in respect to the unpaid stock passes to the assignee, but such liability must be enforced by creditors in their own names, or through a receiver appointed by a court of chancery.

2. The bankruptcy court has no authority to make an assessment, or call upon the stockholders, but if it has, the call in this case is made upon an erroneous basis, since it is made both with respect to liabilities and losses by fire, and with respect to matters for which, under the 6th section of the charter, the stockholders are not liable.

3. That the defendant's stock, for which payment is sought to be enforced, is wholly void, the same being stock which was issued in excess of the $1,000,000 by the directors, without the sanction of the stockholders, as required by the charter, and prior to the amended charter, to which amendment the defendant claims never to have assented.

Mr. Frost, of Miller, Frost, & Lewis, and *C. K. Davis*, for the assignee.

Mr. Gilman, *Mr. Lamprey*, *Mr. Horn*, *Mr. Warner*, and others, for the defendant.

DILLON, *Circuit Judge*.—The questions arising in this cause have been presented by counsel with a degree of thoroughness, research, and logical force rarely witnessed, and as an early determination of the cause is desirable, the court proceeds to announce its conclusions without waiting to find time to elaborate at any considerable length the grounds upon which its judgment rests.

1. The plaintiff, as the assignee in bankruptcy of the Republic Insurance Company, represents as against its stockholders the rights both of the bankrupt company and its creditors. The company being in bankruptcy, all the claims of its creditors must be established in the bankruptcy court, and its assets collected and distributed under the superintendence of that court.

Whether under its charter the company, if it had not been thrown into bankruptcy, could collect from the stockholders the full amount of their unpaid stock, or could only collect so much as might be necessary to pay "losses" proper as distinguished from "liabilities," it is not necessary to determine, for clearly the unpaid stock is liable to *creditors* for all debts and legal liabilities, and the assignee represents the creditors as well as the company. However it might have been before, creditors cannot, since the supervention of bankruptcy, bring bills in equity or other actions in their own names directly against the stockholders to enforce their liability with respect to their unpaid stock.

The liability on the part of the stockholders is one which is imposed for the benefit of creditors, and creditors must now secure the benefit of it through the assignee. And in respect to the assignee and so far as may be necessary to pay the binding debts and legal liabilities of the company, the principles sanctioned by the supreme court of the United

States in the case of *Ogilvie* v. *Knox Insurance Company*, 22 How. 380, 387, apply here. "Stockholders," says Mr. Justice GRIER, in that case, "who have not paid in the whole amount of stock subscribed and owned by them, stand in the relation of debtors to the corporation for the several amounts due by each of them. * * * The stock subscribed and owned by the several stockholders or partners constitutes the capital or fund publicly pledged to all who deal with them."

2. The assignee can only collect so much of the unpaid stock as may be necessary to satisfy debts provable in bankruptcy against the company, and the necessary costs and expenses of administration; and it follows that the necessity for the sixty per cent assessment made by or under the direction of the bankruptcy court is not collaterally inquirable into in every or any action brought to enforce payment of such assessment. Such questions must be decided in that court. If more is assessed and collected than is necessary to pay claims against the estate, any stockholder may apply to that court for his proportion of the surplus. (*Upton* v. *Hansbrough*, 5 Chicago Legal News, 242.)

3. It is our opinion that the original charter of the company contemplated that any increase of the capital stock beyond $1,000,000 should be assented to by the stockholders as distinguished from the directors. It being admitted that the shares of stock owned by the defendant were no part of the $1,000,000 first issued, but were part of the stock issued by it in excess of the $1,000,000, and prior to the amended charter of March 25, 1869, this stock would not be legal, and no action could be maintained to recover the price of it unless the stock has become legal stock by matters subsequently occurring, or unless the defendant, under the facts proved, is estopped to set up this objection.

The legislature authorized a capital of $5,000,000, but required the assent of the stockholders to any increase be-

yond one million. The amount issued at no time had reached the $5,000,000.

No mode of procuring the assent of the stockholders to the increase of stock is prescribed by the charter. It is conceded that in a meeting of the stockholders of the original million of stock duly convened, a majority might determine upon such increase and bind the minority. On January, 9th, 1868, the directors resolved upon an increase of the capital stock to five millions of dollars. On November 6th, 1868, the defendant subscribed for his stock. On the 13th of January, 1869, there was a regular annual meeting of the stockholders, to which a report was made, showing that $3,746,100 of stock had up to that time been issued, and $3,116,000 of stock was voted at that meeting for directors. The evidence shows that over $800,000, or in round numbers, four-fifths of the first million of stockholders were present, in person or by proxy, and voted at this meeting for directors. No objection then, or ever, was made to the increase of stock, and the old stockholders and the new voted indiscriminately, and the proceeds of all sales of stock were treated and invested by the directors as capital until the company ceased to do business. Two dividends were made in 1869, and one in 1870, upon *all* the stock, which in each of those years exceeded four millions of dollars.

The defendant, in February, 1870, received two of these dividends. On the 25th of March, 1869, the charter was amended authorizing, *inter alia*, the directors to increase the stock. After this, as well as before, the directors repeatedly and always recognized the validity of all the stock which had been issued.

The defendant, it may be admitted, had no personal knowledge of any increase of capital stock, or of the passage of the amended charter, until after this suit was brought,

although the agent who acted for him in his absence in respect to his stock had such knowledge.

The only ground of defence here is that the stock issued in excess of the $1,000,000 is void, because the holders of this first million of stock did not assent to the increase.

From the proofs in the case, we find that at least four-fifths of the original million of stockholders did know of and assent as early as January, 1869, to this increase of stock, and are of opinion that the requisite assent of the stockholders can be shown by their conduct and acquiescence, and need not necessarily be established by any formal vote or resolution.

Inasmuch as during part of 1868, and all of 1869, 1870, and 1871, down to the great fire in Chicago, the company did business and declared dividends, on the basis of having nearly $5,000,000 stock out, a fact not disguised or concealed, but proclaimed to the world, the defendant, as a holder of a stock certificate, which he still retains, and receiving dividends, which he also retains, will not be permitted by the principles of law, in order to escape a liability imposed for the benefit of creditors, to deny at this late day that he is a stockholder in the company. Particularly ought this to be so in view of the amendment of the charter by the legislature giving the *directors* the power to increase the stock, and their subsequent action ratifying what they had previously done.

The original charter contemplating that stock might be issued to the extent of $5,000,000, and that amount never having been quite reached, the amendment of the charter was not of such a radical character as to discharge a non-assenting stockholder from his liability as respects his unpaid stock. This view has been recently taken by the United States circuit court for Indiana in the case of *Payson v. Withers*, 5 Chicago Legal News, 445.

In the conclusion of Judge DRUMMOND in that case on this point we concur.

NELSON, J., concurs.

JUDGMENT FOR THE PLAINTIFF.

NOTE.—As to liability of stockholders, see *Haskins* v. *Harding*, *ante*; *Ashton* v. *Burbank*, *post*.

ASHTON *v.* BURBANK, *et al.*

1. An incorporated company which exercises its power to forfeit the stock of the subscriber for the non-payment of a call, cannot afterwards recover upon a note given to it by such subscriber for a previous unpaid assessment on his stock.
2. The change in the charter of a "life and accident" insurance company, whereby such company is also authorized to transact the business of "fire, marine, and inland insurance," is of such a radical character as to discharge previous subscribers, who do not assent to the change, from liability to pay future assessments on their stock.

(*Before* DILLON and NELSON, JJ.)

Stockholders' Liability.—Power to Forfeit Stock.—Effect of Forfeiture.—Radical Change of Charter.

THIS is an action on a promissory note, dated August 19, 1867, for $8,000, made by the defendants to the Provident Life Insurance and Investment Company. The defendants were subscribers of that company, and the note in suit was given for an assessment upon their stock. The original charter of said company authorized it to transact a "life and accident insurance" business. After the defendants' subscription to the stock, the charter was amended, and the name of the company changed to the Eagle Insurance Company, and it was also authorized, by the amended charter, to transact the business of "fire, marine, and inland in-

surance." The amended charter was accepted, but, in point of fact, the company took no risks during the short period it afterwards did business, except such as were authorized by its original charter. Subsequently, the company, being then in possession of the note in suit, forfeited, under authority given in its charter, the stock of the defendants therein. The note in suit, when long past due, was transferred by the company to the plaintiff.

Based upon these facts, two special defenses are made to the note, the facts relating to which appear in the special verdict, and the question on the special verdict is whether either of these defenses is sufficient in law to defeat a recovery on the note. The special verdict is in these words:

"The note was executed by the defendants, and is now the property of the plaintiff by assignment and purchase from the payee after due, and the plaintiff is entitled to recover thereon the full amount thereof, less the credit indorsed on the same, of $157.50, October 10, 1868, unless the following facts, which we state in the form of a special verdict, constitute a defense:—

"*First Special Defense.*—We find the following facts: The Provident Life Insurance and Investment Company, the payee of the note in suit, was chartered by the legislature of the state of Illinois, February 13, 1865 (Laws of 1865, p. 761, made a part of this verdict), '*to carry on the business of life and accidents insurance*' at Chicago, with power to establish a branch at Peoria, Illinois. The defendants, living in Minnesota, subscribed to the stock of said company, each in the sum of $5,000, and paid, in cash, at the time of the subscription, ten per cent thereon. Some months afterwards, the company made an assessment of fifteen per cent on said stock, and it was for, or in payment of, this assessment, that the note in suit was given. That is, the consideration of said note in suit is the aforesaid assessment of fifteen per cent upon the defendants' said

subscription to the said stock of said company. Two days after the note in suit was given, the defendants received from the said company certificates of stock, which recite that twenty-five dollars on each share had been paid. Each certificate is as follows: —

"'CAPITAL, $1,000,000. SHARES, $100 EACH.

"'*Provident Life Insurance and Investment Company, Chicago, Illinois.*

"'No. 417. 50 Shares.

"'Be it known, that J. C. Burbank, Esq., is entitled to fifty shares of the capital stock of the Provident Life Insurance and Investment Company, on which has been paid twenty-five dollars on each share, and holds the same subject to the conditions and stipulations contained in the act of incorporation of said company; which shares are transferable on the books of the company, at its office, in Chicago, by the said Burbank or his attorney, on the surrender of this certificate and payment of all installments then due, and when such transfer shall be sanctioned and approved by the transfer agent.

[SEAL.] "'Witness the signature of the President and Secretary, and the seal of the company, attached.

"'Chicago, August 21, 1867.

"'I. Y. MUNN, *President.*

"'C. HOLLAND, *Secretary.*

"'This certificate to be surrendered on payment of the next installment, when a new one will be given.'

"This amount was made up as follows, viz: the ten per cent paid at the time of the subscription, and the said fifteen per cent for which the note in suit was executed as aforesaid. On the 10th of October, 1868, the defendants paid the payee $157.50 as interest, being the amount indorsed thereon.

"Subsequently, to-wit, on the 3d day of March, 1869, the

legislative assembly of Illinois passed an act as follows: 'An act to amend an act to incorporate the Provident Life Insurance and Investment Company,' approved February 13, 1865.

"'SEC. 1. *Be it enacted by the people of the state of Illinois, represented in the general assembly,* That so much of section 1 of said act, to which this is amendatory, as relates to the name and style of the corporation, and sections 5 and 15 of the said act, to which this is amendatory, be, and the same are hereby, repealed.

"'SEC. 2. The name and style of the company shall be and is Eagle Insurance Company, and the said company *may transact fire, marine, and inland insurance;* and may hold an annual meeting of the shareholders on the first Tuesday of July, for the election of thirteen directors, to serve until their successors be chosen.

"'Approved March 3, 1869.'

"The defendants neither procured nor assented to said last mentioned act, nor did they know of it until after its passage, and thereupon they protested against it, and refused to pay the note in suit on this ground. Subsequently the said Eagle Insurance Company ceased to do business, and this note, among other assets, was sold to the plaintiff in the year 1871, in payment of a debt due from the Eagle Insurance Company to him. After the said amendment of the charter of March 3, 1869, the Eagle Insurance Company did not, in fact, transact any fire, marine, or inland insurance business, or do any other business than such as was authorized by the original charter.

"*Second Special Defense.*—We find all the foregoing facts, and also the following, to-wit: Under the second section of the charter of the Provident Life Insurance and Investment Company, calls were made upon the defendants in September, 1869, for the payment of an additional assessment of twenty per cent upon their stock, payable October 25, 1869,

which they neglected and refused to pay, and that the board of directors of the Eagle Insurance Company, on the 2d day of December, 1869, declared all the stock on which said assessment had not been paid, including defendants' said stock, *forfeited;* and soon after new stock subscriptions were received from new subscribers, and the old directors went out, and new directors, elected by the new stockholders, came in; and the Eagle Insurance Company ceased to do active business or issue new policies after January, 1870."

The provision in the charter of the company in relation to the forfeiture of stock is, that if any shareholder or subscriber shall neglect to pay a call for a specified number of days, "it shall be lawful for the directors to declare the shares forfeited to the company, and all previous payments made thereon."

Gilman, Clough, & Wilde, for the plaintiff.

E. C. Palmer, for the defendants.

DILLON, *Circuit Judge.*— We hold the following propositions:—

1. The plaintiff taking the note in suit directly from the company, long after it was due, and after the change in the charter, and after the action of the company forfeiting the defendants' stock therein, stands precisely in the place of the company, and cannot recover on the note unless the company could have recovered, had the action been brought by it.

2. The note being given for an unpaid stock assessment, represents, for all the purposes of this action, that assessment, and the note not having been paid, it follows that the defendants have not paid the stock assessment for which the note was given. Under its charter, the company had the power, if any assessment upon stock subscribed was not

paid, to forfeit the stock and all previous payments thereon; or, at its election, the company would have the right to sue for such assessment. But the two courses are inconsistent, and it must elect whether to sue for and recover the stock subscription, or to forfeit the stock. It cannot do both. Having elected, in this case, to forfeit the defendants' stock, it cannot afterwards recover for a prior unpaid assessment; and this doctrine, which was conceded in argument, is not, in our judgment, varied, as the plaintiff's counsel contends, by the circumstance that the company, at the time of the forfeiture of the stock, held the defendants' note for such prior unpaid assessment. (*Small* v. *Herkimer Manuf. Comp.* 2 Comst. 330.)

3. The change in the charter, by which a life and accident company was authorized to transact fire, marine, and inland insurance, is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them. Here there was no such assent, and no acquiescence in the structural change made in the charter of the company. The company could not, against such a subscriber, maintain a suit to collect his subscription, and take the money and use it as capital for the transaction of business under the charter as altered. We think, in such a case, the subscriber is not bound to enjoin action under the amended charter, but may, if he elects, defend against an action to recover on his subscription to the stock.

If the company accepted the amended charter, as it did by adopting the new name, it is not essential to such a defense to show that at the time of the trial the corporation had actually exercised the enlarged powers conferred upon it. The defendants are not bound, on their subscription, to pay to the company money which, if paid, *may* be used as

capital to carry on the business authorized by the amended charter.

JUDGMENT FOR THE DEFENDANTS.

NELSON, J., concurs.

NOTE.—Liability of stockholder to creditors: *Haskins* v. *Harding, ante; Payson* v. *Stoever, ante.*

McCARTY *v.* MANN, *et al.*

1. Congress has power to *re-instate an entry* of public lands which has been cancelled by the commissioner of the general land office, and to provide that this shall be done as of the date of the original entry, so that it shall inure to the benefit of the grantees of the person who originally made the entry.
2. Under such a provision the re-instated entry of the land inures to the benefit of such grantees, irrespective of the fact whether they were grantees with or without warranty.

(*Before* DILLON and NELSON, JJ.)

Public Lands.—Power of Congress.—Re-instatement of Cancelled Entry by Congress.—Effect.—Act of July 27, 1854, Construed.

THIS is a bill in equity to quiet title, and involves the validity and construction of an act of Congress approved July 27th, 1854 (10 Stats. at Large, 798). This act is as follows: "*Be it enacted, &c.*, That the entry by Peter Poncin of the north half of the south-east quarter, &c., sec. 36, &c., cancelled by the commissioner of the general land office, be and the same is hereby allowed and reinstated as of the date of the said entry, so that the title to the said lands may inure to the benefit of his grantees as far as he may have conveyed the same;" then follows a proviso that Poncin

shall make payment therefor at the land office, and "thereupon a patent shall issue in the name of the said Peter Poncin for said lands."

On the 13th of February, 1850, Peter Poncin located a land warrant on the land described in the act. On March 28th, 1850, he conveyed the same by warranty, for the consideration of $150, to one Pepin, and Pepin, on March 29th, 1850, conveyed by warranty to French, and French, in consideration of $500, on March 29th, 1851, conveyed by quit claim to Elfelt. On the 10th day of March, 1852, the commissioner of the general land office cancelled the location of Poncin. On the 18th day of October, 1853, Elfelt conveyed to Van Etten. The title then stood in Van Etten at the date of the afore-mentioned act of July 27th, 1854. On the 31st day of October, 1854, Poncin paid for the land at the land office, and on the 24th day of March, 1855, received a patent under and reciting the said act of July 27th, 1854.

The defendants claim under the said deed of March 29th, 1851, from French to Elfelt. After the patent to Poncin was issued, viz., on the 14th day of January, 1856, French made another deed by quit claim to one Furber, and it is under this deed that the plaintiff claims title. Neither party is in possession. The land was laid out in July, 1855, as "Robinson & Van Etten's addition to St. Paul," and is now of great value.

W. H. McCarty, and *Gilman, Clough, & Wilde*, for the plaintiff.

Geo. L. Otis, for the defendants.

Dillon, *Circuit Judge.*—The location of Poncin was cancelled by the commissioner because it was made on land which had been duly reserved from sale as school land, and the government, by the second section of the act of July

27th, 1854, granted to the territory of Minnesota for school purposes other lands in the place of those which by that act it authorized to be patented to Poncin. The act of July 27th, 1854, validated, on condition of payment, the entry of Poncin which had been cancelled, and declared that the said entry should be "allowed and reinstated as the *date of the said entry*," which was February 18th, 1850. The act declared one purpose for which this was done to be "that the title to the said land should inure to the benefit of the grantees of Poncin as far as he may have conveyed the same." The condition of payment to the government was subsequently complied with.

It is, in our opinion, too plain to admit of fair controversy that Congress had the power to reinstate the entry, and to declare the terms on which it would do so. It was the land of the general government, and under the absolute disposal of Congress. It saw fit to dispose of it for the benefit of Poncin and his grantees, one of whom was Van Etten. French having before that time conveyed to Elfelt, the grantor of Van Etten, had no longer any interest in the land, and could derive no benefit from the act. In 1856, when he made the quit claim to Furber, under which the plaintiff claims he had no interest in the land, and consequently conveyed none. We are unable to see any ground on which the plaintiff can rest. He claims under a deed made long after the act of 1854. Neither he nor French, under whom he claims, had any interest in the land when that act was passed. He insists that the land was solely that of the government, and how *he* can question the right of the sovereign to dispose of its land as it may see fit, and its action in recognizing equities in the grantees of Poncin, we confess we have been unable to discover. His counsel's argument rests upon the assumption that Poncin became the absolute owner in his own right by the patent in 1855; that no precedent equities existed, or could by Congress be

recognized to exist, and that the title under the act inured only to the grantees of Poncin, who held by deeds of *warranty*. Such a construction would defeat the manifest intention of the act.

By the construction for which the plaintiff contends the act was passed for, or inured to, the benefit of French, although he had on the 19th day of April, 1850, made a bond for a deed to Elfelt, which was recorded, and although he had on March 19th, 1851, for a valuable consideration, conveyed by a deed which was also on record, all his interest in said lands to Elfelt. It is utterly inconceivable that Congress intended the act for the benefit of French. It was intended for the benefit of the owners under Poncin, and the owner at the time of its passage was Van Etten, the grantee of Elfelt.

The bill must be dismissed.

NELSON, J. concurs.

BILL DISMISSED.

SARAH ANN RANDALL v. LOUIS KREIGER.

1. The act of the territorial legislature of Minnesota of 1857 (Laws of 1857, p. 29), *validating conveyances* of lands made under a joint power of attorney from husband and wife, is constitutional as respects prior deeds, when no vested rights are infringed.
2. The *right of dower is inchoate* and contingent until the death of the husband, and before that event is, as respects the wife, under the absolute control of the legislature; and it is competent for the legislature to enact that deeds *theretofore* executed, under a joint power of attorney from husband and wife, shall be binding; and if both husband and wife are living at the date of such enactment, the wife cannot, *after the death of the husband*, claim dower on the ground that she had no legal power to join her husband in appointing an attorney in fact at the time the latter acted under the letter of attorney, and made a deed for value, purporting to convey a good title and to bar her dower.

(*Before* DILLON, *Circuit Judge.*)

Dower.—Extent of Legislative Control.—Defective Deeds.—Curative Act.—Legislative Power.

THIS is a bill in equity for dower. The complainant is the widow of John Randall, of New York, who died in 1869. She and her husband were married in 1848, and never resided in Minnesota. The husband became seized of the land in which dower is claimed in 1849; and the same was conveyed by deed dated January 16, 1855, which deed, by virtue of a letter of attorney, was made to the grantor of the defendant. This letter of attorney is dated on the 11th day of April, 1849, *is signed by John Randall and by the complainant*, and was acknowledged in the city of New York on the same day, before a commissioner of deeds. It authorizes the attorney in fact, one William H. Randall, "for us, and in our names, to sell all real estate belonging to us, or either of us, in Minnesota, in such lots, and for such prices, and on such terms, as in his judgment he may deem best; and to execute and deliver to the purchasers *good and sufficient deeds*, or contracts of sale, or other instruments in writing requisite to receive the purchase money." etc., etc. This was recorded, and not revoked until 1859—over ten years. Meanwhile, viz., January 16, 1855, in consideration of $3,000, the attorney in fact, in the name of John Randall and Sarah Ann Randall (the complainant), conveyed by *warranty* the lots in which dower is now claimed to one Smith, under whom the defendant derives title. The plaintiff is the sole legatee and devisee of her husband, who died in New York, leaving an estate of over $100,000 in value, of which she has received, up to this time, from the executor under the will, about $50,000. This is one of many similar cases pending in this court.

Lorenzo Allis, for the plaintiff.

Messrs. Bigelow & Clark, *Messrs. Lamphreys*, *Mr. Horn*, *Mr. Heard*, *Mr. Otis*, and others, for the defendant.

DILLON, *Circuit Judge.*—This is a bill in equity by Mrs. Randall to recover dower. The seizen was after the marriage, and the alienation by the husband (for it is conceded that the deed made by the attorney in fact binds the husband) was in 1855. His death occurred in 1869.

The defendant's counsel resist the claim for dower upon several grounds:—

1. Because, as they contend, the statute in force in 1855, when the alienation was made, only gave dower to non-residents in lands of which the husband *died seized.* (Rev. Stat. 1851, p. 219, sec. 21.)

2. Because, as they contend, the joint deed of herself and husband, made by the attorney under the power, had the effect, under the legislation existing at the time, to bar the dower.

3. Because, as the conveyance was by warranty, and as the plaintiff is the sole legatee and devisee under the will of her husband, and has claimed under it, she cannot, in equity, be allowed to maintain what is in effect a suit against the estate of her husband, since, if she recovers her dower, his warranty is thereby broken, and his estate liable on the covenants in the husband's deed, and this amount she will have to pay as the sole party interested in his estate.

As I do not place my judgment upon any of these grounds, I do not deem it necessary to examine them. I am of the opinion that the case falls within the curative or remedial provisions of the act of 1857 (Laws of 1857, p. 29), and that this act, having been passed before the right to dower became consummate by the death of the husband, is a valid exercise of legislative power.

This act provides as follows: "A husband and wife may convey, by their lawful agent or attorney, any estate or in-

terest in any lands situate within the territory; and all deeds or conveyance of any such lands, *whether heretofore or hereafter made under a joint power of attorney from the husband and wife, shall be binding*, and shall have the same effect as if made by the original parties."

If it be true, as complainant's counsel insists, that the deed made under power of attorney to Smith was not effectual to bar her dower, by reason of her inability, under the state of the statute law, to appoint an attorney to act for her, this is cured by the express terms of the enactment of 1857, and the only question that can be made is as to its validity as respects prior conveyances.

Until the death of the husband, the right to dower is inchoate and contingent. It becomes consummate only upon that event. In my opinion, the better view is, that while the right remains inchoate, it is, as respects the wife, under the absolute control of the legislature, which may, by general enactment, change, abridge, or even destroy it, as its judgment may dictate. (See *Lucas* v. *Sawyer*, 17 Iowa, 517, 521, and authorities cited.) "So," says WRIGHT, C. J., in the case just cited, "the legislature may declare what acts of the wife shall amount to a relinquishment of her right of dower; or that her deed shall be effectual to bar the same." Again, he says: "In measuring her right, we look to the law in force at the time of the husband's death, for it is this event which ripens or makes consummate the prior right, which, so long as it rested upon the marriage and seizin, was inchoate only. If there was no law in force at that time giving her the right, then it is extinguished. She cannot take under a law repealed prior to that time. And taking a law then existing, she must take it with its restrictions and limitations."

It was competent, therefore, for the legislature to say, as respects all inchoate rights of dower, as it did say by the act of 1857, that deeds executed under a joint power of attorney

from husband and wife "shall be binding," and, if binding, the claim of the wife here to dower is barred, for she joined in the power of attorney under which the deed was made. Of the constitutionality of the enactment, there remains no question after the repeated decisions of the supreme court of the United States. (See *Satterlee* v. *Matthewson*, 2 Peters, 380; *Watson* v. *Mercer*, 8 Peters, 88; 2 Scribner on Dower, 344–366; Cooley Const. Lim. 373–378.)

Of the expediency and justice of the enactment resulting from the imperfect and confused state of the legislation respecting the mode of executing conveyances and relinquishments of dower by non-residents, I have as little question as I have that it was an act which the legislature might lawfully pass.

NELSON, J., did not sit.

BILL DISMISSED.

NOTE.—An appeal was prayed and allowed.

"The decided weight of authority is in favor of the doctrine that the right to dower may, at any time before the husband's death, be enlarged, abridged, or entirely taken away:" *Per* WRIGHT, C. J. in *Lucas* v. *Sawyer*, 17 Iowa, p. 521, where the authorities are cited.

More particularly bearing on the principal case, see *Frantz* v. *Howard*, 18 Ind. 507; *Galbraith* v. *Gray*, 20 Ind. 290.

JOHN S. KENNEDY & CO. v. THE ST. PAUL & PACIFIC RAILROAD COMPANY, and others.

1. To prevent a valuable land grant in favor of a railroad company from lapsing, a *receiver was appointed* at the instance of bondholders of the company, whose principal security was the said lands, and the receiver was empowered to borrow money to complete the unfinished portions of the road, and his debentures issued for that purpose were made a lien on the road and lands of the company.
2. Form of the order, and the nature of the lien for the money borrowed. [See note.]

(*Before* DILLON, *Circuit Judge.*)

Land Grant to Railroad Company.—Receiver.—Power to Borrow Money to Complete Line of Road to Save the Land Grant.

THIS was a motion by complainants upon bill and affidavits for the appointment of a receiver. The complainants are holders of certain railroad mortgage bonds, and sue for themselves and all other bondholders who may come in and seek relief by the suit. The defendants are, "The St. Paul & Pacific Railroad Company," "The First Division of the St. Paul & Pacific Railroad Company" (both corporations under the laws of Minnesota), George L. Becker, Wm. G. Moorehead, and Horace Thompson, trustees under a certain mortgage for $15,000,000, hereinafter described, certain trustees under other mortgages given by said railroad companies, and "The Northern Pacific Railroad Company."

The material facts are substantially as follows, viz: The said St. Paul & Pacific Company was organized under the act of March 10, 1862, and was authorized, *inter alia*, to construct a railroad from St. Paul, northwesterly, *via* St. Anthony, to Breckenridge, about two hundred and twenty miles, called the "main line;" with a branch from St. Anthony, up the Mississippi river, to Watab, about ninety miles, called the "branch line;" with a line from Watab, up said river, to Brainerd, about sixty miles, called the "Brainerd Extension;" with a line from St. Cloud, northwesterly, to St. Vincent, near the British Possessions, about three hundred and thirty miles, called the "St. Vincent Extension." Under acts of Congress of March 3, 1857, March 3, 1865, and March 3, 1871, respectively, and various legislative acts of the state of Minnesota, said company was endowed with a land grant of ten sections to the mile, title to vest as often as twenty miles should be completed and equipped.

The said *First Division Company* was created out of said St. Paul & Pacific Company by the issue of special stock under act of the state legislature February 6, 1864, and was vested with all the rights, franchises, and property of said St. Paul & Pacific Company appertaining to said main line, from St. Paul to Breckenridge, and to said branch line from St. Anthony to Watab. Its lines of road are all completed. It stands charged with mortgages as follows, viz: On *main* line, from St. Anthony to Breckenridge—March 1, 1864, $8,000,000; July 1, 1868, $6,000,000; December 1, 1870, $1,500,000, to one Litchfield. On *branch* line, from St. Paul to Watab—March 11, 1862, $120,000; June 2, 1861, one for $700,000 and one for $1,200,000; October 1, 1865, $2,800,-000. Of the latter class but $780,000 were issued, leaving $2,020,000, for exchange for bonds of the prior issues, making the entire bonded indebtedness on the main line $10,-500,000, and on the branch line about $2,800,000. Except the Litchfield mortgage, nearly all of this indebtedness is owned and held in Holland, Europe.

In the fall of the year 1870, the east sixty miles of the said main line was uncompleted, and the parties interested in its completion, including said First Division Company, in order to raise money for its completion and at the same time secure the completion of the said St. Vincent and Brainerd extensions, brought about an arrangement between the said two companies as follows, viz: On the 1st of April, 1871, the said First Division Company issued its bonds for $15,000,000, and, to secure said issue, the said St. Paul & Pacific Company mortgaged to said Becker, Moorehead, and Thompson, trustees, all its franchises, rights, and property, including its said land grant, appertaining to said St. Vincent and Brainerd extensions, and executed to said First Division Company a lease, for ninety-nine years, of its road for both of said extensions, and, in consideration thereof, the said First Division Company undertook to negotiate said

bonds, and out of the proceeds thereof to construct, complete, and equip the said extensions from St. Cloud to St. Vincent, and from Watab to Brainerd, on or before the 1st day of *March*, 1873, on which day the aforesaid land grant would lapse by limitation of said acts of Congress. By the terms of said mortgage, the whole proceeds of said $15,000,000 issue were to go to the construction of said extension lines, so much of said scheme as contemplated a diversion of a portion of said proceeds to the said main line not being made public or communicated to the persons who subsequently purchased said bonds. At the same time the defendant, the Northern Pacific Railroad Company, became the owner, by purchase, of all the capital stock of the said St. Paul & Pacific and First Division Companies. Thereupon the said First Division Company constituted the firm of Lippmann, Rosenthal, & Co., of Amsterdam, Holland, its agents, to negotiate said bonds, and prior to January 1, 1872, 10,700 of said bonds for $1,000 each were so negotiated, the proceeds amounting to about $8,000,000, after which time the market fell, and no further bonds could be negotiated. The balance of said bonds are still held by said Lippman, Rosenthal, & Co. agents, who claim to hold them for advances to said First Division Company to the amount of $900,000. Of the money thus realized, twenty per cent was set apart for interest, and, after payment of commissions and other expenses, about $3,000,000 of the remainder was used in the completion of said *main* line and the payment of interest on the main line mortgage bonds, and the balance was used in the purchase of iron and material and in the payment to contractors for work on said extension lines. In the fall of 1871, the whole work of constructing and completing said extension lines was let to DeGraff & Co. and commenced by them, the iron to be furnished by the First Division Company — the whole work to be completed prior to said March 3, 1873. In July, 1872, the First Divi-

sion Company failed to meet its engagements to its contractors, and in October of that year was obliged, for want of funds, to order the work stopped, owing to its contractors about $700,000, which was subsequently reduced, by a payment in iron, to about $500,000, which it still owes to said contractors. At the time of such suspension the Brainerd extension was all graded ready for the ties, except about four miles — thirty-five miles from St. Cloud westward, and about one hundred and four miles commencing twelve miles south of Glyndon, the point of junction with said Northern Pacific Company, and extending northward — in all about one hundred and thirty-nine miles, was completed, with cars running, leaving about two hundred and fifty-one miles unfinished, but about three-fourths graded.

By act of Congress of March 3, 1873, the life of said land grant was extended to December 3, 1873. The said First Division Company, at the time of the hearing (July 29, 1873), had taken no step toward completing said lines, and was insolvent, having a large floating debt and interest coupons under protest. It is admitted, or shown, that the average value of the lands to be secured by the construction of said lines is $6 per acre, and without said lands the security for said bonds of the $15,000,000 issue will be greatly inadequate, and the holders thereof must suffer great and irreparable loss. Nearly the whole of said last-named issue of bonds are held in Holland, and the complainants are holders of some of them, as well as holders of some of the bonds of all of said issues except the Litchfield mortgage. Said complainants claim to represent all of the Holland holders of said $15,000,000 issue, and produce specific authority, by cable, from Amsterdam, from such holders, to the amout of $11,622,750 thereof. They also claim, that by reason of the insolvency of said First Division Company, and of various fraudulent and improper acts of its managing officers — which are not here recited, because the court does not deem

them material to the real merits of the application — that a receiver should be appointed for all the lines of said First Division Company, as well as of said extension lines; and they claim as part of the relief to which they are entitled, that the court should charge the sum of $3,000,000, which was so diverted from said extension lines to said main line, as a specific lien upon said main line in favor of said extension lines, to take precedence of the mortgages upon said main line. They also ask that said receiver be authorized to borrow money sufficient to complete said extension lines by the 3d day of December next, and secure the same by debentures, to be a lien upon said extension lines and the lands belonging thereto, to take precedence of said mortgage thereon, and with such money to complete said lines and secure said lands without delay.

George L. Otis, *J. M. Gilman*, and *James Gilfillan*, for the plaintiffs.

Messrs. Bigelow, *Smith*, *Cuyler*, and *Gray*, for the several defendants.

Dillon, *Circuit Judge.*—I am of opinion, upon the facts shown by the pleadings, exhibits, and affidavits, that the plaintiffs are entitled to a receiver as respects the St. Paul & Pacific Company, but not as respects the other defendants. The application has been earnestly pressed as against the First Division Company on the ground of the diversion of the loan for the benefit of that company. But it appears that the road of this company is mortgaged probably to its full value to *bona fide* holders of bonds who had no notice of the equity set up by the plaintiffs. The contingency of the plaintiffs establishing an equitable lien upon the road of the First Division Company, as against its mortgage bondholders, is so improbable as to render it quite clear that the

application for a receiver should, to this extent, be denied. But as against the St. Paul Company, it is manifest that unless a receiver is appointed no further work will be done upon the extension lines, and that the land grant, which is the only security of any considerable value which the plaintiffs and other bondholders have for their large advances, will lapse and be wholly lost. In order to save this land grant the road must be completed by December 3, ensuing; and it seems to me that the exigencies of the case are such as, under the circumstances, to warrant the court, upon the application of the parties chiefly interested, to appoint a receiver and to clothe him with the powers desired.

An order may be drawn up accordingly.

RECEIVER APPOINTED.

NOTE.—The following is the order directed to be entered of record:

"*John S. Kennedy, Henry M. Baker*, and *John S. Barnes*, v. *The St. Paul & Pacific Railroad Company, The First Division of the St. Paul & Pacific Railroad Company, The Northern Pacific Railroad Company, Walter S. Cutting, Russell Sage, Samuel J. Tilden, Edmund Rice, Horace Thompson, George T. M. Davis, John P. Yelverton, William Moorehead*, and *George L. Becker*.

"The application of the plaintiffs for the appointment of a receiver in this cause coming on for a hearing before me at my chambers in the city of Davenport, in the state of Iowa, and, after hearing the bill and various affidavits and proofs of the respective parties, and Messrs. Gilman, Otis, and Gilfillan, of counsel for the plaintiffs, and Mr. Bigelow, of counsel for the defendants, *The First Division of the St. Paul & Pacific Railroad Company, George L. Becker*, and *Horace Thompson*, and Mr. Gray, of counsel for the defendant, *The St. Paul & Pacific Railroad Company*, and Mr. Smith, of counsel for the defendant, *The Northern Pacific Railroad Company*, appearing specially and objecting that the court has not jurisdiction of said defendant; and Mr. Cuyler, of counsel for the defendant, *William G. Morehead*, and, after due deliberation thereon, *it is ordered, adjudged, and decreed*, that Jesse P. Farley, Esq., of Dubuque, Iowa, be and he is hereby appointed receiver of all and singular that certain branch line of railroad of the defendant, *The St. Paul & Pacific Railroad Company*, or which the said railroad company is by law authorized to construct, and which is to be constructed and to run from a point at or

near the town of St. Cloud, in the county of Stearns, and state of Minnesota, to the town of St Vincent, in said state, and also of that other line of railroad of said defendant, *The St. Paul & Pacific Railroad Company*, which said railroad company is by law authorized to construct, and which is to be constructed and to run from Watab, in the county of Benton, to Brainerd, in the county of Crow Wing, within said state, as contemplated by various acts of the Congress of the United States; and also of all the right, title, and interest which said defendant, *The St. Paul & Pacific Railroad Company*, has now or shall at any time hereafter acquire by reason of the construction of said railroads, or of either, or of any part of either thereof, in, to, and concerning all the lands situate in said state of Minnesota and granted, or intended to be granted, by various acts of the Congress of the United States for the purpose of aiding in the construction of said lines of railroad, or which the said defendant, *The St. Paul & Pacific Railroad Company*, has acquired or may be entitled to, or may hereafter acquire, pertaining to said railroad by grants from said state of Minnesota, and of all and singular the roadbeds, tracks, bridges, viaducts, culverts, fences, freight-houses, wood-houses, machine shops, and other shops, and all other structures, buildings, and materials whatsoever, placed or to be placed on the said railroads respectively, or either or any part of either thereof, or acquired or to be acquired for the use of the same; and, also, of all locomotives, tenders, passenger, baggage, freight, cattle, and other cars, and all other rolling stock whatsoever; and, also, of all machinery, tools, implements, fuel, and materials now owned or hereafter to be acquired by said defendant, *The St. Paul & Pacific Railroad Company*, for constructing, operating, repairing, or replacing the said railroads, or either or of any part of either thereof, and of all the equipments or appurtenances of the said railroads, or of either or any part of either thereof, and of all property, rights, franchises, privileges whatsoever, appertaining to the said railroads, or to either or any part of either thereof, now held or hereafter to be acquired by said defendant, *The St. Paul & Pacific Railroad Company*, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad, lands, and premises, or any part thereof, belonging or in anywise appertaining; and, also, of all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of the said defendant, *The St. Paul & Pacific Railroad Company*, in, to, and concerning the said railroad, and every part and parcel thereof, with the powers and duties hereinafter expressed.

"And the said receiver is hereby authorized and directed forthwith to take possession of all and singular the aforesaid property, and to proceed without delay to construct and complete the unconstructed por-

tions of said railroads, and to put those portions thereof already constructed, or partly constructed, in good order to be operated as a railroad, and to do the same, if practicable, by or before the 3d day of December next.

"And he is further authorized and directed to do and perform all acts and things necessary to be done and performed to vest and secure in said railroad company the title to all lands granted or intended to be granted by any acts of Congress or of the legislature of the state of Minnesota to the said railroad company.

"And for such purpose the said receiver is hereby authorized and directed to borrow, on the terms as to time of payment and rates of interest set forth in the following form of debenture, a sum of money not exceeding $5,000,000 as shall be necessary to complete and equip said railroads, so as to secure said lands as herein directed, and to issue to the person or persons advancing said sum or sums of money his debentures or certificates, with coupons or interest warrants attached, signed by him, expressing the amounts so advanced, and the terms upon which the same shall be advanced, which debentures or certificates shall be in the form following:—

"$............ ST. PAUL, MINNESOTA, ..., 1873.

"'Five years after date, unless sooner paid, for value received, I promise to pay to ...., or his assigns, the sum of .... dollars in gold, with interest thereon at the rate of ten per centum per annum, payable in gold semi-annually on the first days of July and January of each year at the city of New York.

"'This obligation is issued under and by virtue of certain provisions of an order of the circuit court of the United States for the district of Minnesota, dated on the ...... day of ...., 1873, a copy of which is indorsed hereon, and is part of the loan thereby authorized to be made by me as receiver of the St. Paul & Pacific Railroad Company, amounting, in all, to the sum of $5,000,000.

"'The said loan, or so much thereof as may be required to complete the construction of the St. Paul & Pacific railroad, and shall be borrowed by me for that purpose under the authority aforesaid, is made and constituted, as provided in the order of the court, a *first lien* upon all the property of every nature and description of the said railroad company; and the earnings of said railroad, after deducting the operating expenses and the expenses of the receivership, are pledged for the payment of the principal and interest of this obligation, according to the tenor thereof.

"'Failure to pay interest for six months will make principal due at option of holder.

"'..., *Receiver*.'

(*Interest coupons annexed.*)

Until further order of the court, said debentures shall not be sold for less than par in the currency of the United States, and before any shall be sold the receiver must be satisfied that he can sell or place sufficient thereof to complete and equip the said road or some one or more of the unconstructed intervals in the line thereof.

"And it is hereby further ordered, adjudged, and decreed that such debentures or certificates shall be, and they are hereby, adjudged to be a lien for the principal and interest thereof, upon all the lands, premises, and property hereinbefore mentioned, prior to all other liens or claims thereon whatsoever. And the defendant, *The St. Paul & Pacific Railroad Company*, is hereby ordered, adjudged, and decreed to pay the principal and the interest mentioned in such debentures or certificates at the times and according to the terms thereof, and in case of failure of said company to pay the interest or principal of such debentures or certificates according to the terms thereof, any holder, or any number of holders, of such debentures or certificates may institute and prosecute a suit in his or their name or names on behalf of himself or themselves, and all others, the holders of said debentures or certificates, to enforce the lien and compel payment thereof.

"And the said receiver is authorized to purchase all necessary material, to employ all necessary agents and servants, and to make all contracts necessary for the purposes aforesaid.

"And the defendants, and each of them, having in their, his, or its possession, or under their, his, or its control any of the property hereinbefore mentioned, are hereby ordered forthwith, upon the demand of said receiver, to deliver the same into the possession of said receiver.

"And the said defendants, and each of them, and their, his, or its officers, agents, attorneys, and servants, are hereby strictly enjoined and commanded absolutely to refrain from interfering with the said lands, premises, and property, or any part thereof, and from in any manner interfering with the said receiver in the performance, by him, of the acts which he is hereby directed to perform. This injunction shall not be construed to prohibit the officers of the St. Paul & Pacific Railroad Company from taking any steps necessary to secure to said company titles to lands granted to it, nor to prevent the Northern Pacific Railroad Company asserting before the departments at Washington, or in any court, its right to any lands granted to it.

"And it is further ordered that said receiver, before entering upon the duties of his office, take and file with the clerk an oath to faithfully perform the duties thereof, and also file with the clerk a bond, with two or more sureties, to be approved by the judge of the district court of the

United States for the district of Minnesota, in the sum of one hundred thousand dollars ($100,000), conditioned for the faithful performance of such duties.

"That said receiver deposit all moneys coming into his hands in the registry of the court at St. Paul, and said money shall be paid out under the rules of the court.

"That said receiver, after assuming the duties of his office, make and file with the clerk on the first day of each month a full statement of the business of his office during the preceding month.

"The main object of this order is to ensure the completion of the said roads by the 3d day of December next, and the receiver is instructed so to act, under the limitations aforesaid, as to see that this object shall be accomplished, and to proceed at once and with expedition.

"All contracts for construction, or purchase of iron, to be approved by the court, or by one of the judges thereof.

"It is the intention of the foregoing order, that if the said $5,000,000, or so much thereof as may be required fully to complete said extension lines, shall be furnished to or borrowed by the receiver to give to the holders of the said receiver's debentures a first lien upon the said road, road-bed, franchises, and lands, and each and every part thereof, and the income and earnings of the said road, as specified in the above order. If, however, the receiver shall borrow upon the said debentures herein authorized, money sufficient to complete only some one or more of the unconstructed intervals in the line of said road, it is the intention of said order to give to the holders of the said debentures a first lien upon the road and road-bed so completed, and the franchises of the company pertaining thereto, and all the lands to which the said company may be entitled or may acquire by virtue of the completion of the said part or parts of said road.

"And if any of the money so borrowed by the said receiver on the said debentures shall be used for finishing or putting in order any part of said road now ironed, the same to the extent thus used shall be a first lien on the part or parts of said road upon which it is used. All other matters are continued until the first Monday in September next.

"Given under my hand August 1, 1873.

"JOHN F. DILLON, *Circuit Judge*."

[On the first day of September, upon a further hearing, the foregoing order was modified as follows:]—

"The original order, appointing Jesse P. Farley receiver herein, having been made on the first day of August, 1873, and dated of that date, and the matters continued in and by said order coming on again before

me at my chambers at Davenport, Iowa, on the first day of September, A. D. 1873, and having heard Geo. L. Otis, of counsel for said complainant, and Horace Bigelow, Esq. of counsel for *The First Division of the St. Paul & Pacific Railroad Company*, *George L. Becker*, and others, defendants herein; and, on motion of Mr. Otis, of complainant's counsel, it is hereby further *ordered*, that the aforesaid order appointing a receiver herein, as aforesaid, be, and the same is hereby, modified as follows, viz: —

"*1st.* Until further order of the court, said debentures shall not be sold for less than par in the currency of the United States, and before any shall be sold the receiver must be satisfied that he can sell or place sufficient thereof to complete and equip the said road, or some one or more of the unconstructed intervals in the line thereof, or such portions of one or more of such unconstructed intervals as he may deem practicable.

"*2d.* In case the whole interval between a point at or near Melrose and a point about twelve miles south of Glyndon shall be so constructed and equipped, and the portion of the road belonging to said St. Vincent extension, which is now ironed, shall be completed by the 3d day of December, 1873, then the expense of so constructing, completing, and equipping the same shall be a first lien upon the line of the said St. Vincent extension, its road, lands, land grants, franchises, and property, from St. Cloud to the end of the present construction at a point about ninety-two miles north of Glyndon.

"*3d.* In case the whole of the Brainerd extension, so-called, to-wit: the line between Watab and Brainerd, shall be so constructed and equipped by the 3d day of December, 1873, then the expense of so constructing and equipping the same shall be a first lien upon the whole of said extension line, its road, land, land grants, franchises, and property.

"*4th.* All the expense of completing and equipping the portions of said extension lines already ironed, except in the case provided for in subdivision two, shall be a first lien upon the portions so completed and equipped.

"*5th.* The expense of all construction of any portion of said lines, or either of them, other than construction upon some interval to be fully completed, as aforesaid, shall be a first lien upon that portion of the road so constructed, and upon all the land, land grants, franchises, and property of such constructed portion or portions.

"*6th.* The bond of said receiver may be approved by either the judge of the said district court or by the judge of this court.

"*7th.* All further and other matters are continued until the first Monday of October next.

"JOHN F. DILLON, *Circuit Judge.*

"DATED September 1, 1873."

In re McElrath. *In re* Easton.

1. Directions of the court to its receiver in possession of and operating the Southern Minnesota railroad, in respect to conforming to the state statute regulating freight and passenger tariffs.
2. Petition of a shipper, whom the receiver had charged more than the statutory rate, to be allowed to sue the receiver in this court in respect of such excess, granted.

(*Before* Dillon and Nelson, JJ.)

Railway Tariff Act of Minnesota.—Instructions to Receiver in Respect Thereto.

The Southern Minnesota Railroad Company is in the hands of a receiver, appointed by this court, November 7th, 1872, upon the bill of complaint of Samuel B. Ruggles and Albon P. Mann, trustees, to foreclose certain mortgages executed to them in trust to secure the payment of its bonds. The reasons for the appointment of a receiver are given in the opinion of Nelson, J., which will be found reported at length in the Internal Revenue Record for 1873, p. 29, and in the Chicago Legal News, 1872. The bill is still pending in this court. On March 6th, 1871, the legislature of the state of Minnesota passed an act prescribing the maximum rates which railway companies in the state may charge for carrying freights and passengers therein. This act has been held constitutional by the supreme court of the state. At the June term, 1873, the receiver presented a petition to the court, praying, among other things, for instructions in regard to the rates of transportation to be charged, under the act of the legislature of 1871. At the same time a petition was presented from J. C. Easton, a heavy shipper over the company's line of road, asking permission to sue the receiver for over-charges of freight under that act. Affidavits of Mr. Drake and Mr. Thompson, show-

· the practical effect of the act of 1871, were submitted ;he court.

T. J. Horn and *Gordon E. Cole*, for the trustees.

Geo. L. Otis, for the receiver.

Mr. Heard, for Mr. Easton.

DILLON, *Circuit Judge*, in disposing of the petitions, with ; concurrence of NELSON, *District Judge*, remarked, in ostance:—

The Southern Minnesota Railroad Company is in the nds of a receiver, appointed by this court, in a proceed- g by the trustees of its bondholders, to foreclose the first d second mortgages for near five million of dollars on the operty and franchises of the railroad company.

The suit cannot be determined at this term, and the re- iver, two days since, made application to the court for rections as to his duty in operating the road to conform the statute of the state, of March 6th, 1871, regulating e tariff of prices or rates to be charged for the transpor- tion of freight and passengers on all railroads within the ate. This statute fixes maximum rates which may be arged, and prohibits, under penalties, the taking of any 'eater rates. It appears by affidavits on file that none of .e railroad companies in the state have obeyed the statute, id that they place their refusal to conform to it on the round that it is an unconstitutional invasion of their char- red rights. It is contended to be unconstitutional in two spects: 1st. Because it is wholly beyond the legislative ower (the right not having been reserved when the char- rs were granted) to prescribe the compensation which the companies shall charge for the services they render. 2d. Be- cause, if the legislature has the power to prevent discrimi- nation against the public, it has no power unjustly to dis-

criminate against the companies, and require them to render services for an inadequate compensation; and in support of this position affidavits are filed to show that the tariff or schedule of prices fixed by the state statute does discriminate against certain productions and localities in favor of others, and in many instances requires services to be performed at much less than the actual cost to the company.

If Mr. Drake is not mistaken as to the practical effect of the act of March 6th, 1871, it would seem that the act was not very carefully considered, but the courts cannot of course overthrow a statute because it may be unreasonable, but only because it it unconstitutional. And in respect to the Southern Minnesota Railroad Company, a showing is made that if the receiver shall conform to the statute throughout it will have the effect to reduce the earnings of the road (which are already insufficient to pay the running expenses and interest on its bonded debt) $150,000 per annum. It is, indeed, stated as the opinion of the receiver, that the receipts, under the tariff fixed by the state, would be insufficient to maintain the road in repair and pay operating expenses.

It is shown to us that quite recently the supreme court of the state has sustained the validity of this state legislation, at least to the extent to which the question of its validity was before it for its decision; and that an appeal from its judgment is being prosecuted without delay to the supreme court of the United States.

At the same time that the receiver applied for instructions, one J. C. Easton presented his petition to the court for its permission to sue the receiver to recover freight charges paid in excess of the rates allowed by the statute of 1871.

These two applications are before us for disposition. The petition of Easton for leave to sue the receiver is of easy

disposition, and the requisite leave is granted, and the parties advised to make, if possible, an agreed case, so that an early determination can be had. The other petition presents difficulties which have not a little embarrassed us, since what ought to be done by the receiver depends upon the question of the constitutional validity of the railroad tariff statute of the state. The court will hesitate before pursuing or sanctioning a course which will bring it in antagonism to the public policy of the state; and if the only question involved was whether the state legislation infringed some peculiar provision of the constitution of the state, we should regard it our duty freely to accept as correct and final the authoritative determination of the supreme court of the state. But evidently here the main question is whether this legislation infringes rights of the companies which are under the protection of the constitution of the United States.

The federal constitution protects all contracts from legislative or judicial invasion on the part of the states, and legislative charters are contracts within the meaning of the constitution; and the question is whether this legislation does invade chartered rights of the companies. This is a federal question, one whose ultimate solution and final settlement rests, and rests alone, with the supreme court of the United States. Upon such a question the decisions of the state courts have a persuasive or argumentative, but no binding or authoritative, force.

In the short time which has elapsed since that question was presented, the court has had no opportunity for its investigation, nor will it have the requisite time before it adjourns. It does not desire in an informal way to prejudge the momentous question here involved.

It is evident that a direction to the receiver to conform in all things to the statute of the state would very injuriously affect the creditors of this company, which is already insol-

vent, and from such a direction no appeal would lay, nor could any relief be had if it were erroneous. On the other hand, if no direction is made, and if the receiver shall continue the same course hitherto pursued, all the funds will be in the hands of the court, and the court will be open to allow parties aggrieved by the charges to apply to sue the receiver, or have the excess beyond the statute rate refunded.

For the present, therefore, until the question shall be decided by the supreme court of the United States, or until it shall have been decided by us in the regular way, in the case which we have authorized to be brought against the receiver, or in some other case, or until we shall have had opportunity to investigate the question with the aid of arguments, we make no further order. We decline to order the receiver to disregard the state law, but we do not make, at present, any more peremptory order than the one above indicated. We add that there is always a presumption in favor of the validity of an act of the legislature, and that the receiver would be well justified, until further order, in following the state statute, in all instances where the rates fixed by it were reasonable and fairly compensatory to the company. The receiver will form fair and impartial judgments in this matter, and if, while the subject remains before us for further consideration, he is of opinion that the rates fixed by the statute are unjust, and that they are unreasonably low and will not compensate for the services required, he is at liberty to act in such cases, for the time being, under the direction and advice of the trustees, who are the parties having the most at stake in this matter. It must not be implied that we have any fixed opinion or impression that there is any middle ground between the absolute right of the companies on the one hand to fix their own compensation, and the absolute right, on the other, of the legislature to prescribe their compensation. But fair and

just rates while the matter is *sub judice* will actually injure no one, and as the court has control of the funds in the hands of the receiver, and the power, as it will have the inclination, to restore any moneys which may turn out to have been improperly received, the course above indicated seems to be the best practicable temporary disposition of the receiver's petition. A final determination of the question will not be unnecessarily delayed, and when reached the directions to the receiver will be made to conform to it.

Upon the foregoing announcement being made, the trustees for the bondholders stated that an agreed case was about being made to be submitted at this term, to test the validity of the act of March 6th, 1871.

NOTE.—Such a case was made and subsequently submitted to the court, but has not yet been decided.

THE LA CROSSE RAILROAD BRIDGE.

1. Contract for the construction of a bridge across the Mississippi river at La Crosse, between the Bridge Company and the Southern Minnesota Railroad Company (in the hands of a receiver appointed by this court, in a foreclosure proceeding), ratified, subject, however, to certain conditions limiting the duration of the contract, and to regulate the compensation to be paid for the use of the bridge by the railroad company, or its assigns or successors, or the purchasers at the foreclosure sale under the deed of trust.
2. The order of the court held not appealable by bondholders not parties to the suit.

(*Before* DILLON and NELSON, JJ.)

Railroad Bridge at La Crosse.—Contract Ratified, with Conditions Annexed.

THIS was a bill in chancery by the plaintiffs, to foreclose two certain mortgages given by the defendant, to secure some five million dollars of its bonds, on about one hundred

and eighty miles of its road, and franchises and property appertaining thereto. The road commences on the west bank of the Mississippi river, opposite La Crosse, and is completed westward one hundred and sixty-seven miles. The plaintiff applied to his honor Judge NELSON, at chambers, and obtained the appointment of a receiver, who took possession of the road and property mortgaged, with directions to operate the road pending the suit. The appointment of receiver was opposed by the company, and the suit was also contested. (See *In re McElrath*, *ante*, p. 460.)

The railroad company had the franchise and right to construct a railroad bridge across the Mississippi river, and extend its track over the same, so as to connect its road with La Crosse, and with the roads running thence east to Milwaukee and Chicago; but the franchise to construct and operate such bridge was not covered by or embraced within said mortgages. The company was also empowered, by its charter, to create and issue, in such manner and on such terms as it might deem expedient, special stock on any part of its road, and to agree with the holders thereof for the appropriation of the net earnings of any portion of its road to the payment of dividends on such special stock, which agreement should be effectual to secure to the holders of such special stock the application of such net earnings, as against any future act of the company, or any of its general liabilities.

In this state of the case, the plaintiffs filed a special petition in the suit, setting forth the foregoing facts, and that the construction of such railroad bridge would be of great advantage to the road in the transaction of its business, and enhance the value of the road and the security of the bondholders under the mortgages; and that a contract was about to be entered into between said company and certain capitalists, whereby the company was to issue its special stock to the amount of one million dollars ($1,000,000), in consid-

eration of which such capitalists were to construct said bridge, control, manage, and keep the same in repair, and that certain tolls were to be charged for the use of the same, and all the net earnings of the same were to be appropriated as dividends on such special stock; the company binding itself to operate its road over said bridge when constructed, in the transportation of freight destined to cross the river at that point, so far as it could control the same; but that the execution of said contract, and the construction of the bridge thereunder, depended upon having the interests represented by these plaintiffs and by the receiver also bound thereby. And the petition prayed an order of the court granting permission to the plaintiffs and to the receiver to become parties to such agreement, so far as to bind the interests thereto, represented by them under said mortgages in said suit, and that such order be made a part of the final judgment or decree in the action, so that all rights acquired under said mortgages, through final judgment or decree in the action, should be subject to such agreement.

The petition was presented to the Circuit Judge at chambers, at Des Moines, May 23d, 1873, all parties in the action appearing and assenting thereto; whereupon an order was made granting the prayer of the petition, with a special provision that any contract made under or by virtue of the order, should, before the same should have any validity, be presented to the court for its ratification and approval, the power to ratify or reject being expressly reserved to the court.

At the regular June term of the court, the matter came up for further consideration, and a contract was presented to the court for approval, when Alexander Mitchell, Russell Sage, and W. C. Gurney appeared by counsel, and asked to be made parties in this action, as bondholders under the mortgages to the amount of about $100,000, for the purpose of opposing the ratification of the contract, or

the granting of any such order as prayed for; whereupon an order was made specially admitting them as party defendants, to be heard in opposition to the approval of the contract. None other of the $5,000,000 of bondholders appeared to oppose the contract, and the express assent of a large majority was shown. The contract, as presented, was of unlimited duration, and prescribed fixed rates of compensation to the bridge company.

Per CURIAM.—Although the parties to the record consent to the contract as made, yet, upon consideration, we think it advisable (since the future cannot be forecast) to annex to our approval of the contract the following conditions or modifications:—

First. The rates, tolls, and compensation provided for in said contract to be paid for the use of the bridge and track by the said company, its assigns, successors, or purchasers, at the foreclosure sale under the trust deed in suit, or their assigns or successors, shall be and remain in force during the period of ten years after the completion of said bridge, and no longer, unless by the consent of parties then in interest.

Second. At the end of ten years, the tolls shall be fixed at rates which shall be just and reasonable for both parties then in interest, to be agreed upon every five years, and if the parties cannot agree, the question shall be a judicial one, to be determined by a competent court of equity jurisdiction, upon bill filed for that purpose.

Third. At the expiration of twenty years from the completion of the bridge, and successively at periods of five years thereafter, the company, or its assigns, or its successors, or purchasers at the foreclosure proceedings under the deed of trust now in suit, may elect to purchase said bridge, and the rights and franchises in connection therewith, and if the parties cannot agree upon the price, the same shall be

determined by a court of chancery, upon bill filed for that purpose, which price shall be fixed by the chancellor, subject to appeal, at such sum as, under all the circumstances, shall then appear to be fair, just, and equitable, having reference to the profits which have been derived by the bridge company, the value of the structure and the property, and the value of the bridge franchise across the river at that time and place, and any other circumstances that will conduce to the ascertainment of an equitable result.

Fourth. The court decides nothing as to the exact *situs* of the bridge, but leaves that to the determination, under the laws of Congress and of the state, of the parties to the contract.

The said Mitchell, Sage, and Gurney, by their counsel, thereupon claimed an appeal from the order of the court in the premises, but the court, upon consideration, decided it was not an appealable order, and refused to allow the same.

H. J. Horn, and *Gilfillan & Williams*, for the plaintiffs.

J. M. Gilman, and *Bigelow, Flandrau, & Clark*, for the railroad company.

J. W. Cary, for Mitchell, Sage, and Gurney.

SECOMBE *v.* MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. Under the legislation of the state, the Milwaukee & St. Paul Railway Company is the lawful successor of the rights of way obtained by its predecessor, the Minnesota Central Railway Company.
2. The proceedings on behalf of the railroad company to obtain the right of way over the lot in question examined; and it was held that they were sufficient to divest the title of the owner, upon the payment into court for him of the amount of compensation awarded for the property taken.

(*Before* DILLON and NELSON, JJ.)

Corporate Succession.—Eminent Domain.—Right of Way.

THIS action is brought to recover possession of lot 10, block 42, in the city of Minneapolis.

Ovid Pinney and Hiram Osborne, it is conceded, were the owners in fee of the lot, August 19th, 1863. On August 9th, 1866, Pinney conveyed his interest, which was one-sixteenth, to Stewart, and on February 19th, 1870, Stewart conveyed to plaintiff. On February 15th, 1870, Osborne and wife by their attorney in fact conveyed their interest, fifteen-sixteenths, to plaintiff, so that he became the owner of all the interest Pinney held in the lot August 9th, 1866, and all that Osborne held July 15th, 1870.

The defendant claims title as the successor to the rights and franchises of the Minnesota Railway Company. The latter company obtained all its corporate powers by the acts of the legislature of the state of Minnesota, passed March 8th, 1861, March 10th, 1862, and February 1st, 1864, and by virtue of these acts became vested with all the rights, powers, and franchises of the Minneapolis & Cedar Valley Railroad Company.

The Minneapolis, Fairbault, & Cedar Valley Railroad Company, the immediate successor of the Minneapolis & Cedar Valley Company, commenced proceedings, under the charter of the latter company, passed March 1st, 1856, to obtain the right of way for its railroad over lot 10, and a final judgment of condemnation in behalf of the Minnesota Central Railway, its successor, was entered December 22d, 1868, under the 20th and 22d sections of the act of February 1st, 1864.

The amount of damages awarded was paid on that day, and it became, as it is claimed, entitled to the exclusive use, control, possession, and absolute title to this lot, which, by proper instruments of conveyance, passed to the defendant.

Secombe, plaintiff, in person.

F. R. E. Cornell, for the defendant.

NELSON, *District Judge*.—It is urged against the validity of the defendant's title:—

First. That the Minnesota Central Railway Company, in whose favor the judgment of condemnation was entered, was not a corporation.

Second. That all of the proceedings taken to obtain the title to the lot were void.

The first point came before the supreme court of the state of Minnesota in the case of the *First Division of the St. Paul & Pacific Railroad Company* v. *Parcher*, 15 Minnesota, 297. And it was expressly settled by the court in that case that the act creating the St. Paul & Pacific Railroad Company a corporation, and vesting it with all the rights and franchises of the Pacific Railroad Company, which had become forfeited to the state, was not in violation of sec. 2, art. 10, of the constitution. The act of February 1st, 1864, comes clearly within the reasoning of the court in that case, and created the Minnesota Central Railroad Company a corporation by virtue thereof.

In regard to the second proposition, many points are urged against the judgment of condemnation, which, in our opinion, although they might be proper subjects for the consideration of the legislature, cannot affect its validity.

It is necessary to a proper understanding of the position of the defendant to give a history of the proceedings which resulted in the judgment of condemnation.

The Minneapolis, Faribault, & Cedar Valley Railroad Company, by act of March 10th, 1862, succeeded to all the rights of the Minneapolis & Cedar Valley Railroad Company, and on the 19th day of August, 1863, commenced proceedings under the charter of the latter company, passed March 1st, 1856, to condemn the lot in controversy. Section

10 of this act requires in substance that the company should give thirty days notice of an application to the judge of the district court of the state for the appointment of three commissioners to appraise the damages for right of way, by publishing the same in a newspaper in the county through which the road runs, and after the appointment of the commissioners it should be their duty "to cause ten days' notice of their meeting to appraise the damages of any land through which said road may run, to the owner or claimant thereof." Provided, that "the notice * * shall be in writing, and delivered to the owner or owners; * * or, if non-residents, then said notice shall be published in the nearest newspaper to where said land is situated, at least four weeks before making said appraisement."

The necessary steps were taken by the company, commencing by the publication of a notice on the day aforesaid, that application would be made to the judge of the district court of Hennepin county, October 26th, 1863, for the appointment of three commissioners. They were appointed by the judge on that day, and gave the required notice of their meeting on December 2d, 1862, to appraise the damages, personally, upon Pinney more than ten days before their meeting, and upon Osborne, who was not found by the person authorized to serve the notices, by publication of the same for a period of four weeks in a newspaper printed in Minneapolis. The commissioners met December 2d, 1863. Pending these proceedings, and before the commissioners had made and filed their award, the act of February 1st, 1864, was passed, changing the name of the company to that of the Minnesota Central Railway Company, and provided in section 22 of the same that "The proceedings heretofore taken by said company for the appointment of commissioners to assess damages for lands taken by said company, and the proceedings of such commissioners are hereby confirmed, and all proceedings in all cases pending

at the time of the passage of *this* act shall be carried on and completed in conformity with the provisions of *this* act, and with the same effect as is specified in this act, and all proceedings heretofore taken in any case may be filed with the clerk of the district court of the county where the lands to which they relate are situated, with the like effect."

The company, after this, perfected and completed their proceedings under section 20 of this act of February 1st, 1864. The commissioners made their report April 8th, 1864, awarding the damages, and filed it on the 16th of the same month.

On July 26th, 1867, the judge ordered the money awarded to be paid into court for the benefit of the parties interested, and judgment was entered condemning the property for the use of the railroad company, and the money was paid, under this order, December 22d, 1868.

We have examined the record and the proceedings in this case, from the commencement to the final entry of judgment, and find that the company pursued the statutory provisions.

It is urged by the plaintiff that section 10 of the act of March 1st, 1856, and section 20 of the act of February 1st, 1864, when followed, can confer no right to the property sought to be taken, for the reason that no proceedings in court are contemplated by those sections, and no notice of the award when filed is to be given, and no personal service of notice is to be made upon non-residents.

The legislature of this state was the only competent tribunal to judge of the mode and manner of exercising the right of eminent domain within the constitutional limits, and having given this company authority to obtain rights of way and depot ground, by section 10 of the act of 1856, and section 20 of the act of 1864, it is our duty only, no questions being raised as to the constitutionality of these sections, to see that the authority was not exceeded. The

statute is the guide for the action of the company, and if we find that it has conformed to the provisions of the several acts laid down for its government in these proceedings, it is not our province to question the discretion exercised by the legislature.

In our opinion, the judge of the district court, who appointed the commissioners, obtained jurisdiction of the proceedings. The notices were sufficient. The necessary steps were taken to secure the attendance of claimants to the lot, at the meeting held to consider the amount of damages. The 22d section of the act of February, 1864, confirmed the proceedings previously taken. No appeal was taken from the award to the court, where there might have been a trial by jury, and it is now too late for the owners or their assigns to object.

It is true that after the order was made for judgment, and that the money be paid into court, several months elapsed before it was done; but this delay, in our opinion, does not invalidate the judgment. No action was taken to have it set aside. The award was confirmed without complaint, and the owners cannot now attack it here on that account.

The record of judgment has been completed, and the same, with a certificate by the clerk of satisfaction as against the company, has been filed with the register of deeds of Hennepin county. This record is declared by law to be evidence of title to the lands described therein, in the same manner and with like effect as deeds to real estate.

The title to this lot is perfect in the defendant, in our opinion, and judgment must be entered accordingly.

DILLON, *Circuit Judge*, concurs.

JUDGMENT ACCORDINGLY.

NOTE.—A writ of error was sued out from the supreme court.

As to condemnation of right of way: *Eidemiller* v. *Wyandotte, ante.*

Relation of new corporations to the old corporations in Minnesota, see *Hopkins* v. *St. Paul & Pacific Railroad Company, ante.*

REPORTS

OF

CASES DETERMINED

IN THE

Circuit Court of the United States,

FOR THE

DISTRICT OF IOWA.

MUMM, Adm'r of John Johnson, *v.* OWENS.

A servant brought an action against his master for negligence, and during its pendency died. Under the statute of the state by which the action survived, his administrator was substituted as plaintiff, and the action continued in his name, and came on for trial. The servant, before his death, was fully examined and cross-examined as a witness in his own behalf, and his examination was reduced to the form of a deposition, and, on the trial, was read in evidence to the jury by the administrator against the defendant: *Held*, under the act of Congress of March 3, 1865 (13 Stats. at Large, 583), that the defendant should be allowed to testify on his own behalf as to the matters embraced in the deposition of the plaintiff's intestate.

(*Before* DILLON, *Circuit Judge.*)

Evidence.— Competency of Parties.— Act of March 3, 1865, *Construed.*

THIS action was originally instituted by John Johnson in his life time, to recover for injuries caused, as alleged, by

the defendant's negligence. The defendant was a contractor, under the government, for building locks in the canal near Keokuk, and Johnson was employed by him as a laborer. The defendant gave orders to fifteen or twenty men to lift a heavy box, or turn-table, and remove it to a designated place, and, in the course of executing this order, Johnson was seriously injured. For the injury thus occasioned, this action was brought by Johnson. Johnson's deposition, after issues settled, was taken upon the whole case, and he was fully examined and cross-examined as to all matters in controversy. Subsequently he died, and, under the statute of the state, his administrator was substituted as plaintiff, and the cause proceeded in his name. On trial, the plaintiff Mumm, as administrator, read in evidence to the jury the above-mentioned deposition of his intestate, the said Johnson, and produced other evidence to the jury in relation to the accident, its cause, and the extent of Johnson's injury.

When the plaintiff had rested, the defendant's counsel offered the *defendant himself* as a witness in his own behalf. The plaintiff's counsel objected, on the ground, that as the plaintiff was an administrator, the defendant was not a competent witness for himself.

Craig & Gibbons, for the plaintiff.

Gillmore & Anderson, for the defendant.

Dillon, *Circuit Judge.*—This action was brought by Johnson in his life time, for personal injuries to himself, caused by the alleged negligence of the defendant, and pending the action he died, and his administrator was substituted as the party plaintiff, and he seeks to recover for the same injuries for which the action was commenced by Johnson. Under

the statute of the state, the action survives, as will be seen by the case of *Shafer* v. *Grimes*, 23 Iowa, 550.

It is to be noticed that this is not an action by the administrator, under the statute of the state, to recover damages for the death of Johnson; but it is the original action, brought by Johnson, which did not abate by his death, but, under the statute, survived to his administrator. Johnson, before his death, was examined as a witness in his own behalf, and his examination was reduced to writing, in the form of a deposition, and this deposition has been read in evidence by the plaintiff.

Now, is the defendant, under these circumstances, precluded from testifying to the matters covered by Johnson's evidence, as contained in the deposition read to the jury? Under the act of Congress of July 2, 1864 (13 Stats. at Large, 351, sec. 3), and of March 3, 1865 (*Ib.* 533, sec. 1), it is my opinion that the defendant should be allowed to testify, if the plaintiff insists upon keeping the testimony of his intestate before the jury.

The first act above cited makes parties competent witnesses in all civil cases; and the second act does not pronounce an absolute disqualification against the living party when the adverse party is an administrator, but enacts that he "shall not be allowed to testify against the other as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court." In this case, the intestate has testified, and his testimony is before the jury; to exclude the defendant from giving his version of the same transaction would be manifestly unfair, and in contravention of the purpose and spirit of the legislation of Congress.

EVIDENCE ADMITTED.

LANCASTER v. COUNTY AUDITOR.

The county auditor can not lawfully refuse to receive from the owner of the patent or regular title to lands, the amount of money, when tendered in time, necessary to redeem the same from a sale for taxes, on the ground that there is an outstanding tax title to the same lands in some one else.

(*Before* DILLON, *Circuit Judge.*)

Tax Sale.—Redemption.

THE plaintiff claimed to be the owner of certain lands in Page county which had been sold for taxes in 1864, and for which a deed was given to the purchaser. In 1867 the land was again sold for taxes, to one Callanan. In 1870, the plaintiff went to the county auditor's office, and offered to redeem the lands from the last sale, but the auditor refused to accept the money, on the ground that he was no longer the owner of the land, and the only person who could redeem was the holder of the tax deed under the former sale. This suit was brought to redeem the land, and to enjoin the treasurer from making a deed under the last sale.

Brown, Campbell, & Sully, for the complainant.

Barcroft, Gatch, & Hammond, for the defendant.

DILLON, *Circuit Judge.*—We hold that the plaintiff had the right to redeem; that the auditor had no right to refuse to issue the redemption certificate, and that it was his duty to receive the money tendered by the owner of the regular title. The existence of an outstanding deed could not prevent the owner from protecting his interest from the inception of a new estate under the last sale.

DECREE ACCORDINGLY.

NORTHWESTERN UNION PACKET COMPANY *v.* SAMUEL ATLEE.

1. The district court, as a court of admiralty, has jurisdiction of a cause wherein the libellant seeks to recover damages caused to his vessel by a pier erected by the respondent, without legal authority, within the navigable channel of the Mississippi river.
2. A riparian proprietor on the Mississippi, although he be the owner of a saw mill thereon, has no right, without legislative authority, to erect a solid pier of masonry within the navigable channel of the river, in order to fasten thereto a boom for the protection of logs; and such a pier comes within the legal notion of a nuisance.
3. The respondent held to be in fault for failing to keep such a pier lighted at night, in consequence of which libellant's vessel was sunk, and her cargo injured.
4. Extent of riparian rights on the Mississippi river considered.

(*Before* DILLON, *Circuit Judge.*)

Admiralty.—Jurisdiction.—Riparian Rights.—Piers in the Navigable Channel.

THIS is an appeal by the libellant from the decree of the district court in admiralty, holding that there was mutual fault, and ordering an apportionment of the damages. The packet company above named filed a libel in admiralty in the district court, against the respondent, Atlee, to recover damages for injuries to the barge Reaney and cargo, by reason of its running against a pier placed in the Mississippi river by the respondent. The accident, or collision, as it is termed in the record, happened about eleven o'clock on the night of the 23d day of April, 1871. The steamboat Sheridan, with the barge Reaney in tow, lashed to her starboard side, was descending the river from St. Paul to St. Louis, this being her first trip during the season, and struck the upper pier of the respondent. The night was dark, and there was no light upon the pier at the time. The respondent had for many years been the owner of a tract of land bordering on the Mississippi river, just below the town of Fort Madison, Iowa. Upon this land, and near the bank

of the river, he has erected extensive mills for the purpose of sawing logs, mostly pine, which come down in rafts from the pine regions of the upper Mississippi, into lumber. These rafts or logs, coming down during the high water, or the rafting season, the respondent has for years been in the practice of mooring in the water opposite his land, and near his mill, and in the neighborhood of the piers built by him and presently to be described. These rafts remained in the water until the logs were sawed, and frequently extended further out into the stream than the location of the pier with which the barge collided. As the respondent found his rafts somewhat insecure when fastened in this manner, he built, in the winter of 1870–71, in the river, near his mills, two piers (one several hundred feet below the other), to which he attached a boom, for the better protection of his logs. The injury complained of was occasioned by the upper pier. During the summer of 1870 the respondent had placed in the river a pile of rock, covered with water when the river was high, and exposed to view when it was low. The upper pier was constructed by building on this rock pile a crib, which was filled with stone. The pier is twenty-nine feet by twenty-two feet in size, and is about twenty-five feet high, above the bed of the river. Whether it is in the channel or not, is a disputed question, in relation to which a great mass of testimony was taken. The following facts are not controverted, or are clearly established: The upper outside corner of the pier is about one hundred and forty-nine feet from the bank of the river, and about one hundred and twenty feet from the bank at the stage of water which existed at the time of the collision, and at low water about ninety-nine feet from the bank. The water is about twelve feet deep along the outside of the pier at a low stage of the river; at the time of the collision, the water was about twenty feet deep at the pier. About six or seven hundred feet above is a bar, or delta, from a creek, which

projects into the river about three hundred feet, from which point the bank of the river recedes, so that the complainant's land on the bank is about two hundred feet *in* from where a straight line drawn from the point of the delta to the shore below would come. Outside of this pier there is a free passage way for boats several hundred feet in width. The pilot of the Sheridan was skillful and competent, and fully acquainted with the river, but he had no knowledge of the existence of the pier. He was employed as a pilot during the entire season of 1869 on the upper Mississippi, but not in 1870. The pier was constructed in the winter of 1870–71, and the Sheridan at the time of the collision was making her first trip for the season. He did not keep the boat to the middle of the channel, but ran, or allowed the boat to run, where the pier stood. The barge struck the upper outside corner of the pier (which projected above the water only a few feet), and sank almost immediately. After the collision, the respondent kept lights burning upon the piers. The water is deep enough, even in a low stage, to allow steamboats to pass inside the piers erected by the respondent, and the testimony of more than a dozen pilots is to the effect that before the erection of the piers they had often run their vessels over and about the place where these piers stand.

The district court decided that both parties were in fault —the respondent for failing to keep lights on the pier, and the boat for not keeping more in the middle of the stream —and divided the damages in accordance with the admiralty rule. The total damages reported by the commissioners were $2,147.86, and from the decree confirming this report the libellants appeal.

Howell & Rice, and *J. H. Davidson*, for the libellants.

McCrary, Miller, & McCrary, for the respondent.

Dillon, *Circuit Judge.*—The respondent, who is an extensive manufacturer of lumber from logs, and the proprietor of land on the Mississippi river, upon which his saw mills are situate, the better to carry on his business erected the piers and boom mentioned in the statement of the case. This boom is several hundred feet in length, and is attached to two piers built in the river. The piers are twenty-five feet in height above the bed of the river, and a few feet in height above the surface of the water, and are in size twenty-nine feet by twenty-two feet. They are from one hundred to one hundred and fifty feet from the bank, the distance depending on the stage of water, and the water, even in a low stage, is twelve feet deep at the piers. Boats of the largest size, and at any stage of water, can pass inside of the piers if the way be not obstructed by logs or artificial erections.

The jurisdiction of the district court in admiralty of the case made by the libel, is settled by the supreme court of the United States, and need not be further noticed. (23 How. 209.)

The *right* of the respondent to erect and maintain these piers, at the place, and under the circumstances, stated, presents the main question in the case, and it is a question of great importance. The court may properly take notice that a large portion of all the lumber which is supplied from the pine regions of Wisconsin and Minnesota is floated down the Mississippi in log rafts, which are owned by, or sold to, owners of mills located upon the banks of the river. It is the almost invariable practice of the mill owner to moor the logs in the stream in front of, or near, his mill, and the logs, in general, remain in the stream until they are taken therefrom, one by one, into the mill to be sawed.

The more effectually to secure or protect his logs, the respondent built the piers and boom in question. It is conceded that there is no statute of Congress, or of the state,

authorizing the erection. Its rightfulness depends, therefore, upon the general principles of the law. The respondent claims the right as riparian proprietor, and it follows, of course, that if he has the right, every other like proprietor has the same right.

Notwithstanding the able argument contained in the opinion of his honor in the court below, I have not been able to reach the conclusion that the right claimed for the respondent exists; and although, on a question of this kind, which he has so thoroughly considered, I may well distrust the correctness of my own views, still it is my duty to decide it according to my own judgment. It is not my purpose to enter upon any extended argument against the right which is set up by respondent, but only to indicate briefly the grounds of my opinion.

The paramount right attaching to the Mississippi river is the right to its free and unobstructed navigation. This is a public right. It exists in favor of the whole public, and for all vessels, small as well as large, and for rafts equally with boats. Any erection or obstruction not authorized by competent legislative enactment, which materially interferes with the paramount right of navigation, is unlawful, and comes within the legal notion of a nuisance. The analogy between the river and a highway or street, as respects public rights, is very close. The river is a highway, or waterway, for the use of the public, just the same as a street or highway; and individuals, for their own convenience, have no more right, without legislative authority, to obstruct the one than they have to encumber or obstruct the other. Their rights in both cases are confined to a reasonable use of that which is common to all, and which may not be exclusively appropriated by any.

Telegraph poles, or gas posts, or market houses, in the public streets, are, or may be, convenient and useful, not only to individuals, but to the public; but if put there with-

out legislative sanction, they are, in law, nuisances. And so with any unauthorized individual appropriation of any part of a street. Much more clearly would the law pronounce illegal any exclusive appropriation of a portion of the public way by individuals, for their own convenience, by erections or acts which would, or might, endanger the safety of the public.

The same principles apply to the rights of the public in the river. The adjacent owner may make a reasonable use of the river and the banks. He may, doubtless, land his rafts, and fasten them to the bank in front of his property. How long he might keep his logs stationary in the water, we need not inquire, for the injury to the libellant's vessel was not caused by coming in contact with logs thus moored by the riparian proprietor, but by piers of solid masonry, built at a point which the evidence establishes to be within the navigable channel of the river, even at its lowest stage. No individual can, of his own notion, and for his own advantage, abridge or infringe the rights of the public in respect to the navigation of the river. A pier built within the navigable channel, that is, at a point in the river where vessels may go, and where they have the right to go, is an unlawful structure in the eye of the law. Indeed, any permanent structure which interferes with, or which may endanger or obstruct, navigation, is unlawful, and cannot be legalized by any considerations of utility, or otherwise, except by direct legislative authority.

Accordingly, it has been held that the erection and maintenance, without legislative permission, of a dam in the Wisconsin river, at a place where it is navigable in fact, is unlawful, whether it does or does not interfere with the navigation of the river. (*Wisconsin Imp. Co.* v. *Lyons*, 30 Wis. p. 61.)

It is suggested that there is an analogy between piers like those erected by respondent and bridges across navigable

streams. But, though bridges across such streams may be of great private convenience and public utility, still legislative sanction is necessary to legalize their existence.

Again, it is argued that the right of the respondent to build and maintain the piers in question rests, or may be rested, upon the same grounds upon which rests the right of the riparian proprietor to erect wharves and landing places for his own and the public use. Structures of the character just named, connected with the shore, when not erected in violation of legislative regulations, when they do not obstruct the paramount right of navigation, and are not nuisances in fact, have the sanction of long usage in this country, and, under the qualifications suggested, may be lawfully erected; but the right, it is said, must be understood as terminating at the point of navigability. (*Dutton* v. *Strong*, 1 Black, 23, 32; *Yates* v. *Milwaukee*, 10 Wall. 497.)

The reason why wharves and landing places are thus sanctioned is, that they are aids to navigation, and necessary for the reasonable enjoyment of the respective rights of the public and the riparian proprietor. But the right to erect piers in the navigable channel, in order to construct a boom for the protection and detention of logs until the riparian proprietor may manufacture them, rests upon no such usage; nor can such be justly said to be aids to navigation, which, it is to be remembered, is the paramount right —not in the least to be infringed, without legislative sanction.

If the piers in question be considered unlawful, the liability of the defendant is clear. The pilot of the libellant's boat had no knowledge of the piers, and there was no light upon them to warn him of their existence. In my judgment, he is not to be held in fault for not knowing that there was an unlawful obstruction in the river, and standing further out in the stream. Undoubtedly, if he had known of the piers, and if they had been lighted so that he

could have seen their location, it would have been his duty, if practicable, to have kept his boat away from them. In my opinion, the fault lies wholly with the respondent. This is clearly so, if the pier on which the boat was injured was not lawfully there. But suppose I am in error in the above view, I still think the fault is with the respondent, because of the failure to have lights upon it. The river was high; it was at a season of the year when usually there were no rafts moored in the stream, and it was not unlikely that boats might run against it. I cannot think the pilot is in fault, under these circumstances, for not having run his boat farther out in the stream. So that, in any view of the case, I consider the respondent liable for all the damages.

It is suggested that these views will occasion alarm to mill owners upon the Mississippi; but I perceive no cause for apprehension. If it should be deemed of sufficient importance, Congress would doubtless concede all necessary rights, and regulate the mode of their enjoyment. This may, perhaps, be also done by the state, in the absence of action by Congress. But, without such legislative action, it is not probable that mill owners will be disturbed in the exercise of their accustomed privileges so long as they are reasonably enjoyed, and do not esentially interfere with or endanger the paramount right of a navigator.

The decree below will be reversed, and a decree entered here for the appellant against the defendant for the $2,147.86 reported by the commissioners.

REVERSED.

NOTE.— As to obstructions in navigable rivers: Addison on Torts chap. 4, sec. 1, p. 169, and cases cited.

Since the appeal in the foregoing case was taken, Congress, on the 3d day of March, 1873 (18 Stats. at Large, 606), authorized "the owners of saw mills on the Mississippi river, under the direction of the Secretary of War, to construct piers or cribs in front of their mill property, on the banks of said river, for the protection of their mills and rafts against

damage by floods and ice: *Provided* however, that the piers or cribs so constructed shall not interfere with, or obstruct, the navigation of said river," etc. This enactment implies that piers built in the river, and which interfere with, or obstruct, its navigation, are illegal.

The supreme court of Michigan, at the July term, 1873, decided the following points: —

1. Where a brig bound for Chicago broke a boom in passing out of Manistee river, and was proceeded against under chapter 210 of the Compiled Laws of 1871, relating to "proceedings for the collection of demands against water-craft," it was held that while the act cited was meant to give relief where the vessel was at the time navigating the waters of the state, and where no remedy could be had in admiralty, it was not confined to water-craft intended for use only in the waters of this state.

Judge Campbell, dissenting from a majority of the court, held that the act was designed to authorize proceedings analagous to those in admiralty, and to create a lien not enforceable in any other way. (*Brig City of Erie* v. *Canfields.*)

2. A boom that extends no farther into the water than the landowner, with due regard to navigation, might extend it, is a structure pertaining to the adjacent land, as much as any wharf or building erected thereon, and a wrongful injury to it is not a marine injury, and the tort cannot, therefore, be redressed in admiralty. *Ib.*

3. The right of navigation is not so far paramount as to make booming facilities a nuisance wherever they encroach on navigable waters, and in any case the question of nuisance must depend on the particular facts. The necessity and convenience of the floatage of lumber in the Manistee river, in the region of which the manufacture of lumber is the prime industry, must be considered in any rules laid down for the public use of the stream. *Ib.*

LOUIS C. WINTER v. IOWA, MINNESOTA, & NORTH PACIFIC RAILWAY COMPANY.

1. The provisions of the bankrupt act apply *to railway corporations*, and if they commit an act of bankruptcy they may be proceeded against under that act.
2. It is *not an act of bankruptcy*, under section 39 of the bankrupt act, as amended July 14th, 1870 (16 Stats. at Large, 276) for a railway company to suspend and not resume payment of its commercial paper for a period of fourteen days.

3. ***Object and effect*** **of the said amendment of July 14th, 1870, discussed and considered.**

4. An *executory* agreement by a railway company to transfer certificates of its stock to a creditor is not an act for which the company can be thrown into bankruptcy.

5. Effect of transfer by the company of its stock, discussed.

(*Before* DILLON, *Circuit Judge.*)

Railway Company.—Acts of Bankruptcy.—Commercial Paper. —Preference.— Transfer of Stock.

THIS is a petition for revision under the second section of the bankrupt act. Winter filed his petition in the district court, representing that he was a creditor of the above named railway company, and charging that the company had committed certain specified acts of bankruptcy, asked that it be declared a bankrupt. To this petition a demurrer was sustained by the district court; and it is that ruling that the petitioning creditor, Winter, now seeks to have revised. The other necessary facts appear in the opinion.

Brown & Dudley, for the petitioner for revision.

O. C. Howe, and *Phillips & Phillips*, for the railway company.

DILLON, *Circuit Judge.*—The defendant is a railway corporation, organized under the general incorporation acts of the state of Iowa, and although not material, perhaps, to the determination of the legal questions now presented, counsel admitted that no part of its road was yet in operation.

The first ground of demurrer is that the defendant is not a "moneyed, business, or commercial corporation," within the meaning of the bankrupt act, and hence the provisions of that act do not apply to it. The provisions of this act

shall apply to all moneyed, business, or commercial corporations, and joint stock companies." Section 37. Except as otherwise provided, *corporations* are within the bankrupt act (section 48) and in my judgment the purpose of Congress in the use of the language above quoted from section 37 was to include all corporations of a private nature, organized for pecuniary profit. Instead of undertaking to enumerate by name or description the various kinds of such corporations, language broad enough to include them, and which would exclude corporations of a public, civil, or municipal character, as well as those organized purely and strictly for religious, charitable, educational, and like purposes, was employed.

Railways fall within the designation of business or commercial corporations. Domestic or inter-state commerce, as well as foreign commerce, is contemplated by the constitution, and is habitually carried on by land as well as by water. Indeed, since the general introduction of railways, it is a fact known to all that navigation by river has relatively become of secondary importance, and the inland commerce and travel of the country are largely conducted and carried on by means of railways.

The question whether railroad companies are within the operation of the bankrupt act has several times been before the courts, and so far as the researches of counsel have extended, it has been uniformly decided that they were. *Alabama, &c. Company* v. *Jones*, 5 Nat. Bank. Reg. 97, per WOODS, circuit judge; *Adams* v. *Railroad Company*, 5 *Ib.* 99, per SHEPLEY, circuit judge; approved and doctrine reaffimed by CLIFFORD, Justice, in *Sweatt* v. *Railroad Company*, 5 *Ib.* 234. Concurring in the views expressed in the opinions in these cases, it is not necessary to enter into an extended discussion of the question, or to repeat the arguments by which the conclusion reached is sustained.

It has been strongly urged that the practical consequen-

ces of holding this view are so serious, involving the stoppage or interruption of the operations of the road when thrown into bankruptcy, that such a construction should not be adopted. But where the language and intent of the legislature are plain, such arguments belong not to the judiciary. When the language is doubtful and the intent obscure, it is permissible to look at consequences and guide our decision by the aid thus supplied, but such is not, in my judgment, the case with respect to the question now under consideration.

Under the laws of the state, railroads may mortgage their property, or it may be subjected to the payment of their debts by proper judicial order, and in this manner sold and transferred, and really the only question is whether insolvent railway companies shall be made to pay their debts under the collection laws of the state, or under the mode provided by the bankrupt act.

There may be practical difficulties or embarrassments in the administration in bankruptcy of a railway company, owing to the nature of the property, and this might suggest reasons to Congress for excepting such corporations from the act, or for providing a special mode of proceeding; but it affords no sufficient grounds for a forced construction of the present statute so as to exclude such corporations from the scope of its operation.

One of the acts of bankruptcy charged in the petition is the non-payment for more than fourteen days of the commercial paper of the company, viz., two negotiable promissory notes, executed by the railroad company to the petitioning creditor. The demurrer to this portion of the petition presents the question whether the suspension and non-payment by a railroad company for more than fourteen days of its promissory notes is an act of bankruptcy within the meaning of section 39 of the act as amended by the act of July 14th, 1870 (16 Stats. at Large, 276). As thus

amended, the act reads as follows: That any person residing and owing debts as specified in the act, "who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days."

As originally framed, this portion of section 39 of the act had given rise to controversy in respect to the question whether any non-fraudulent suspension by a "banker, merchant, or trader," (the only classes named) of commercial paper, no matter how long continued, was an act of bankruptcy. Various opinions were entertained on this important practical question, and it was a question not free from doubt upon the phraseology of the original act. It was to settle this point that the amendment of July 14th, 1870, was enacted. Under the original act it is plain and undisputed that the person or corporation to be proceeded against under the clause must have been a banker, merchant, or trader. In making the amendment, Congress did two things. First, it extended the provision to "brokers," "manufacturers," and "miners," making six classes in all; and second, it provided in terms that the fraudulent stopping of payment by any person included in any one of these six classes, or the stopping or suspension and non-resumption of payment by any person included in any one of the enumerated six classes of his commercial paper for fourteen days, though not fraudulent, should be acts of bankruptcy. In other words, both clauses of the amendment extend to, and extend only to, persons belonging to one of the enumerated clauses. Mere suspension or non-payment of negotiable or commercial paper by any one else, as, for example, a farmer, or a mechanic, other than a manufacturer or trader, is not an act for which he may be thrown into bankruptcy; and, although I have read the argument in favor of the opposite view, made by a very able and experienced

bankruptcy judge, I cannot agree to its correctness. (*In re Hercules Assurance Society*, 6 Nat. Bankr. Reg. 338, per BLATCHFORD, J.)

As a railroad company organized under the laws of Iowa is neither a banker, broker, merchant, trader, manufacturer, or miner, within the meaning of these words, as used in the bankrupt act, it follows on the supposition that the foregoing views are sound, that it cannot be proceeded against, in bankruptcy, for the mere suspension or non-payment, however long continued, of its commercial paper.

Another act of bankruptcy is alleged in the following language: "That the said railroad company, on the 7th day of August, 1872, being bankrupt and in contemplation of insolvency, *did agree* to issue to J. R. Mershon, its acting president, on demand, the certificates of stock of the said company, in the amount of $4,000, with the intent to give a preference to the said Mershon, and by such disposition of its property to defeat and delay the operation of the bankrupt act."

It is perhaps only necessary to observe that an *unexecuted* agreement by a company to transfer certificates of its stock is not an act for which it can be forced into bankruptcy.

Other acts of bankruptcy are charged to the effect that the company had actually transferred to creditors certificates of its stock, with intent to defeat or delay the bankrupt act by thus giving such creditors a fraudulent preference; and counsel have desired an opinion on the sufficiency of these counts of the petition.

The allegations are not sufficiently specific to warrant the expression of any very definite or final opinion upon the effect of the act charged. The rights of the stockholders are always subordinate to the rights of creditors, and it is difficult to see how the issue at par of the stock of the company not theretofore issued, in payment of the *bona fide* debts

of the company could operate to the prejudice of creditors, or work a fraud upon them.

If, however, the stock was owned by the company as paid up stock lawfully acquired by it, it would probably be then regarded as ordinary property, and if disposed of by the authorized act of the corporation to creditors under circumstances to give them an illegal preference, no reason is perceived why it would not be an act for which the corporation could be proceeded against under the bankrupt law.

The order sustaining the demurrer to the petition of the creditor will be affirmed, and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED.

SCHOOL DISTRICT TOWNSHIP OF NEWTON *v.* JAMES LOMBARD.

1. The holders of *municipal warrants*, though they gave value therefor, are subject to all defences which would have been available had the action been by the payee or party to whom they were originally issued.
2. In this respect, such warrants are different from authorized negotiable bonds or securities issued by public or municipal corporations.
3. A judgment rendered in favor of the holder of school district warrants which were fraudulently issued, and where the school officers connived at the rendition of such judgment, was, upon a bill in equity filed for that purpose, set aside; but the court directed an inquiry to be made by a master as to the consideration actually received by the district for the warrants, and subsequently rendered a decree against the district for the amount in value of such consideration.

(*Before* MILLER and DILLON, JJ.)

School Warrants.—Fraudulent Judgment Thereon Set Aside on Terms.

THIS is a bill in equity to set aside a judgment heretofore obtained in this court against the complainant, the district

township of Newton, in Carroll county, by the defendant, on account of the fraud of the officers of the township in issuing the warrants, and suffering judgment to be rendered thereon. Knowledge of these frauds is charged upon the agent of the defendant, who purchased the warrants and procured the judgment. Testimony was taken, and the cause heretofore submitted to Mr. Justice MILLER, who found that the allegations of the bill were true, and ordered a decree to the effect that the complainant was entitled to have the judgment set aside because of the frauds of the township officers in issuing the warrants and in conniving at the recovery of the judgment thereon; but as to each warrant embraced in the said judgment he directed an inquiry to be made, whether it was fraudulent, and what consideration was actually received therefor by the district. The master has made that inquiry, and reports that of the warrants in the defendant's judgment, $3,286.41 "were fraudulently issued, and for which no consideration whatever has been received by the complainant;" that certain others of said warrants were fraudulently issued, but the complainant has received a partial consideration therefor, to-wit: $407.65, and that $1,600 of the said warrants were not shown to be either fraudulent or without consideration. The defendant excepts to the report of the master, and it is on these exceptions that the cause is now before the court.

Hubbard & Cook, for the complainant.

Grant & Smith, for the defendant.

DILLON, *Circuit Judge*.—The defendant obtained judgment by default against the complainant on the 20th day of October, 1869, for $7,882.28. This judgment was rendered upon what is known as school district warrants, mostly issued in the years 1868 and 1869. The complainant township is situate in one of the newer counties of the state; and as

late as 1870 there were in this township, between the ages of five and twenty-one, only one hundred and sixty-six children. The evidence shows that this district township was out of debt, or nearly so, in 1867, but that in 1868 school officers were elected who systematically set to work to issue to themselves and their confederates and friends school warrants without any consideration, or but a nominal or colorable consideration. It is shown, during these two years, that warrants were issued by these officers to an amount exceeding $30,000, on account of the erection and purchase of school houses, while the actual value of the school houses on account of which these warrants were issued did not reach $2,000. Indeed it is plain, upon the evidence, that during those years the officers only made use of their power to erect and furnish school houses for the fraudulent purpose of obtaining a pretext for the issue of warrants.

A few examples will show the character of the transactions. For school house No. 1, worth about $1,000, warrants for $5,000 were issued; school house No. 2, worth about $500, cost in warrants $2,540; for the two school houses in sub-district No. 3, worth $500, there were issued warrants for over $18,000; for school house No. 4, worth $400, there were $1,200 of warrants issued. School house No. 5 was professedly let to the president to be built by contract for $2,000. He bought, or pretended to buy, a dwelling house of one Atterbury, actually worth $500 to $800, and turned it over to the district for $1,750 in warrants, Atterbury continuing to occupy it, and the school being kept in the garret. The district never obtained title to the house or the ground on which it stands. On account of this house there were warrants issued to the amount of $2,983. To one Elwood were issued $1,483 in warrants for fencing, trees, etc., for school house No. 1; the actual value of the fence which he built was $40, and the trees $5. Other examples may be stated: $600 of war-

rants were issued to Gilley for a fence which he never built; $600 were issued to another man for building a fence worth only $40, and $215 of warrants were issued for banking up school houses, the actual service rendered being worth not to exceed $5; and many warrants were issued for alleged services which were never rendered. These frauds were known to the community, but until 1870 those interested in perpetrating them outnumbered the few honest citizens, who felt themselves unable to resist or prevent their commission. The records of this court show that frauds of a similar character have been practiced for years in many of the new counties in the northwestern portion of the state, and it seems strange that the legislature of the state, or its officers, have been so tardy or remiss in suppressing them.

It is settled law that warrants of this character have not the quality of negotiable paper, which prevents an inquiry into its fraudulent character or its consideration when in the hands of innocent holders for value before due. (*Clark* v. *Des Moines*, 19 Iowa, 199; *Clark* v. *Polk County*, *ib.* 248; *Shepherd* v. *District Township*, 22 Iowa, 595; *Taylor* v. *District Township*, 25 Iowa, 447.) In this respect such warrants are unlike authorized negotiable bonds issued by public or municipal corporations. The holders of these warrants are in no better situation than the payee, and are open to all defences which might have been made against the party to whom they were originally issued. (*Shepherd* v. *District Township*, *supra.*)

In this case it was shown that the agent of the defendant, who purchased for him these warrants for fifty cents on the dollar, or thereabouts, knew, or had good reason to know, that they were fraudulent, or without consideration, and that the school officers connived at the rendition of judgment upon them. Accordingly Mr. Justice MILLER was of opinion that the district township was entitled to have the judgment set aside and the warrants upon which it was

based canceled, except so far as it might appear that some of the warrants were valid, and a consideration therefor was actually received by the district.

On the many exceptions which have been made to the master's report I have examined all the evidence, and find his report sufficiently favorable to the defendant except in one respect. The master rejected the $1,100 of warrants in the defendant's judgment, issued to one Bowers, for building a school house which he never erected. But the only evidence taken on this subject does not establish any fraud nor any default on the part of Bowers. If Bowers did not have title to the lot on which the building was to have been erected (which is the material question), the complainant ought to have more satisfactorily shown it.

The master's action in rejecting the $600 of warrants issued to Hampton in part payment for the Atterbury school house in No. 5 is excepted to; but, both by reason of fraud and want of consideration, these warrants are not binding upon the district. The whole scheme for the purchase of this dwelling house originated in fraud, and warrants issued in pursuance of this scheme, to the fraudulent officer and contractor, cannot be enforced in a court of justice. If the district had title to the property, or were actually in possession of it, there might arise an equity on the part of the innocent holders of these fraudulent warrants to compel the district to pay to the extent of consideration actually received. But such is not the case. On the contrary, the record presents a case of fraud wholly novel in its character and which well illustrates the mode of discharging public trusts there practised. The evidence shows that after the sale Atterbury occupied the house, and it tends to show that the only school kept was one in the garret; that Atterbury's daughter was the teacher, and his children the only scholars.

The exceptions to the report of the master are over-

ruled, and his report conformed except as to the above $1,100, and a decree will be entered to the effect that there are justly due to the defendant, on account of the warrants in suit, the aforesaid sums reported by the master, viz: $407.65 and $1,600, and the said $1,100 — making in all, $3,107.65; and that the same be enforced by execution, and, if necessary, by *mandamus*, in the usual manner; each party to pay his own costs in this suit.

LOVE, J. concurs.

DECREE ACCORDINGLY.

BRONSON v. KEOKUK. ETHRIDGE v. EIGHMEY.

1. The act of June 1, 1872 (17 Stats. at Large, 198, sec. 13), authorizes, in certain cases, the courts of the United States to exercise jurisdiction in equity over the property of *absent defendants* within the district where the suit is brought; but the act recognizes the superiority of personal over constructive service, and the practice under the act should be such as to secure personal service whenever this is practicable, and to resort to constructive service by publication only when the better mode is not practicable within a reasonable time, and by the exercise of reasonable diligence.
2. The order directing the absent defendant to appear, plead, etc., must be made by *the court* in term.

(*Before* DILLON, *Circuit Judge, at Chambers.*)

Service by Publication.—Act of June 1, 1872, *Construed.*

THESE are suits in equity to enforce certain equitable rights against the real estate described in the respective bills of complaint. The suits have been commenced since the last term, and subpœnas in chancery returnable to the March rules, 1873, have been issued and served upon certain of the defendants, and returned by the marshal "not found"

as to the remaining defendants. An application is made, under section 13 of the act of June 1, 1872 (17 Stats. at Large, 198), at rules, and before the next term after the suit was brought, for an order of publication of the subpœnas in chancery, against the defendants whom the marshal returns as not found within the district.

Brown & Dudley, for the complainants. No one appearing for the defendants.

DILLON, *Circuit Judge.*—The act of June 1, 1872 (17 Stats. at Large, 198, section 13), is the first statute enacted by Congress giving to the circuit court the power to make service or acquire jurisdiction for any purpose, by publication; and the right which that statute gives to make service in this manner, is limited to suits in equity to enforce liens or claims against real or personal property within the district. If, in such a suit, any of the defendants are not inhabitants of the district, or are not found within it, or shall not voluntarily appear to the cause, the provision of the statute is, that *the court* may make an order directing such absent defendant to appear, plead, etc., to the bill, at a certain day, to be fixed by the court in the order itself. This order the statute requires to be made by the court, and hence the present application is premature. We cannot know that the defendants, returned as "not found," may not voluntarily appear at the return term. If they do not, the court, upon proper showing and application, can make the order above mentioned, to appear, plead, etc., and designate the day when this shall be done. Now, the statute provides that this order shall be served upon the absent defendant, if practicable, wherever found. The object of service is to give notice; and the superiority of personal service over constructive service in effecting this object is so manifest as to require no remark, and is recognized by the statute itself.

If practicable, says the statute, personal service of the order must be made upon the absent defendant, wherever found; and it is only in cases where such personal service is not practicable, that the statute contemplates that the court shall direct a publication of the order. How is the court to know whether it is practicable to make personal service? This may be ascertained by requiring the complainant, or his attorney or agent, most conversant with the facts, to make a showing on oath as to the residence of absent defendants. If from this it appears that such defendant resides in another district, service upon him may be directed to be made by the marshal of that district; and perhaps, in such a case, the court might make a special order directing or authorizing service by some other officer. If, from the showing, it appears to the satisfaction of the court that the residence of the absent defendant is not known to the complainant, or his agent or attorneys, and cannot, by reasonable diligence, be ascertained (and on this subject the affidavits should state facts, and not mere conclusions), personal service of the order may as well be said not to be practicable, and then the court may direct the order to appear and plead to be published in such manner as it shall deem most likely to give the desired notice.

It would appear to be a proper practice for the bill to aver the citizenship and residence of the respective defendants; to let the subpœna issue against all, and if the marshal return some of them not found, and they do not voluntarily appear, the court, on a showing of these and the necessary facts, as before stated, by affidavit, will make the order to appear and plead, and direct the mode of serving the same. The practice, under the act, should be such as to secure personal service in all cases where the residence of the absent defendant is known, or can be ascertained; and to substitute or resort to constructive service by publication only where the better mode is not practicable within a

reasonable time, and by the exercise of reasonable diligence.

APPLICATION DENIED.

NOTE.—Construction of act of June 1, 1872, see *Schwabacker* v. *Reilly, ante. Hall* v. *Union Pacific Railroad Co. post.*

ALLEN *v.* RYERSON.

1. A cause removed from the state to the federal court, under the act of July 27, 1866, will not be remanded to the state court, merely because the petition for removal does not appear to have been verified.
2. Under the act of July 27, 1866, the non-resident defendant may remove the cause, as to him, where there can be a final determination of the controversy without the presence of a resident co-defendant.
3. In this case it was held that there could be such a final determination.
4. Where a case is made for removal of a cause, under the act of July 27, 1866, the petitioner therefor is not obliged to make an affidavit, such as is required by the act of March 2, 1867.

(*Before* DILLON and LOVE, JJ.)

Removal of Causes.—Act of July 27, 1866, *Construed.*

ON motion by plaintiff to remand the cause to the state court. The material facts are as follows: The plaintiff, B. F. Allen, is a citizen of Iowa. The defendant, Joseph T. Ryerson, is a citizen of Illinois. The other defendant is the sheriff of Polk County, Iowa. The Plaintiff brought this suit in one of the state courts of Iowa. The defendants pleaded, and, before the final hearing, the defendant Ryerson filed an application, under the act of Congress of July 27, 1866 (14 Stats. at Large, 306), to have the cause, as to him, removed into the circuit court of the United States for the

district of Iowa. The application was not verified, but stated the citizenship of the parties, and that the action was to enjoin the defendants; that there could be a final determination of the controversy as to Ryerson without his co-defendant, and offered the requisite security for filing copies of pleadings, etc., in the federal court. The state court made an order transferring the cause to the circuit court of the United States, and now motion is made by the plaintiff to remand the cause to the state court, for the reason that the petition for removal was not verified, and also, among other reasons, that the controversy as to Ryerson could not be determined without the presence of the sheriff, his co-defendant, and that the application does not state that there is any prejudice or local influence, as required by the act of March 2, 1867.

From the bill, it appears that the plaintiff, as a judgment creditor of the "Des Moines Iron Works," had purchased certain real estate belonging to said company, sold on execution, and claimed to have taken with the realty certain machinery, as fixtures. The defendant Ryerson, a junior judgment creditor of said company, claiming that the machinery was not fixtures, and did not pass with the realty, ordered an execution upon his judgment, and caused the same to be levied by the sheriff, his co-defendant, upon the machinery, as the property of the Des Moines Iron Works. Plaintiff's bill was to restrain the defendant from selling, or in any way interfering with, said property, and for injury for the seizure of the same, alleges irreparable damages, etc., and asks that the injunction be made perpetual at the hearing. Defendants, in answer, deny the substance of the bill, and the damages, and ask that the injunction be dissolved.

John D. Rivers, for the motion.

Brown & Dudley, contra.

DILLON, *Circuit Judge.*—1. The motion to remand is made upon three grounds. The first ground is that the petition for the removal, upon which the state court acted, was not verified. The removal was applied for and ordered under the act of July 27, 1866. *This* act does not, in terms, require the petition to be verified (see *Sweeney* v. *Coffin*, 1 Dillon, 73); and we do not think the cause should, for this reason, be remanded. The plaintiff is not *concluded*, by the petition for removal, as to the citizenship of the defendant Ryerson, but may contest that matter in this court, by a plea in the nature of a plea in abatement.

2. The substantial controversy, as disclosed in the plaintiff's bill and in the pleadings, is one between him and the defendant Ryerson. The plaintiff is a citizen of Iowa, and Ryerson is a citizen of Illinois. Judging of the case as made by the pleadings, we think there can be a final determination of the controversy without the presence of the sheriff. If the plaintiff maintains his bill, the decree will restrain the defendant Ryerson, and his agents and attorneys, which will include the sheriff, from further interference with the plaintiff's property; and the court may, if ground of equitable jurisdiction exists, also ascertain and award the plaintiff damages caused by the acts of the sheriff, under Ryerson's direction. If such a decree be satisfied, this will end the case as respects the sheriff. If not satisfied, the plaintiff can proceed, in the state court, against the sheriff, for as to the latter the cause still remains in that court. If Ryerson shall succeed in this court, and the bill be dismissed on the merits, this will dispose of the plaintiff's case against the sheriff in the state court.

3. It is our opinion, that where a case is made for the removal of a cause under the act of July 27, 1866, the petitioner for removal is not obliged to make an affidavit of the

existence of prejudice or local prejudice, such as is required in applications under the act of March 2, 1867.

LOVE, J., concurs.

MOTION DENIED.

NOTE.—Removal by non-resident creditor, who has been substituted for the sheriff: *Beecher* v. *Gillett*, 1 Dillon, 308. See *Nye* v. *Nightingale*, 6 Rho. Is. 489, where it was decided, under section 12 of the judiciary act, that the resident officer was a necessary party.

PAYSON, Assignee, v. DIETZ.

1. The circuit court of the United States has jurisdiction of a common law or equity action brought by an assignee in bankruptcy appointed in another district where such an assignee is a citizen of another state, and the defendant is a citizen of the state where the action is brought, and the amount in dispute exceeds the sum of five hundred dollars.
2. Jurisdiction of the state and federal courts as affected by the bankrupt act, considered.

(*Before* DILLON and LOVE, JJ.)

Bankrupt Act.—Jurisdiction of Circuit Court.

THE defendant moves to dismiss the action for want of jurisdiction.

The petition alleges that the plaintiff, "Josepn R. Payson, assignee in bankruptcy of the Republic Insurance Company of Chicago, Illinois, is a *citizen of the state of Illinois, and that the defendant is a citizen of the state of Iowa.*"

The petition then proceeds to set out a case to recover of the defendant the sum of $600, the amount of an unpaid assessment upon stock held by him in the Republic Insurance Company. Among other averments is one that this company, by reason of losses in the Chicago fire, was una-

able to meet its debts and liabilities, except by an assessment upon its stockholders; that the said company has been adjudged a bankrupt by the proper district court in Illinois; and that the said court, after notice to the stockholders, ordered the assignee to make upon them a call and assessment for the whole amount due and unpaid upon their stock.

There are over one hundred other actions of like character brought by the plaintiff as assignee against the stockholders of the company in this state, in which motions are made to dismiss for want of jurisdiction.

H. B. Allen, *Galusha Parsons*, and *C. H. Gatch*, for the motion.

H. Scott Howell, *Austin Adams*, *John N. Rogers*, and *Joseph G. Anderson*, against the motion.

DILLON, *Circuit Judge.*—Since the amount in dispute exceeds $500, and the plaintiff is a citizen of Illinois, and the defendant a citizen of Iowa, the jurisdiction of this court under the 11th section of the judiciary act plainly exists, unless it be taken away by the provisions of the bankrupt act. It is admitted that there is no express provision depriving either this court or the state courts of jurisdiction of actions in behalf of assignees in bankruptcy. It is argued, however, that the jurisdiction of each of these classes of courts is taken away as a necessary or implied effect of the jurisdiction which is conferred by the bankrupt act upon the district courts of the United States as courts of bankruptcy. It is claimed, and we are inclined to think correctly, that the district courts of the United States have jurisdiction by reason of the subject matter of all proceedings in bankruptcy, and over all actions by assignees in bankruptcy, even though such actions be not brought in the district where the proceedings in bankruptcy are pend-

ing; and that since Congress has thus established bankruptcy courts throughout the United States and given them this full and plenary jurisdiction, and since the second section of the bankrupt act prescribes that the circuit courts may exercise certain specific powers and jurisdiction in bankruptcy proceedings and actions, the conclusion, it is insisted, is a necessary or legitimate one, that it was the intention of Congress that all jurisdiction in bankruptcy cases should be exclusively in the bankruptcy courts, except so far as the bankrupt act expressly confers such jurisdiction upon the circuit court.

We have felt the force of the argument made to support the exclusive jurisdiction of the district courts in all actions relating to the collection of the assets of the estate, and in all other actions concerning the estate, except so far as a concurrent jurisdiction is vested in a limited class of cases by the second section in the circuit courts; but upon the best consideration we have been able to give to this view, we have not been able to reach the conclusion that it is sound.

We mention briefly some of the reasons which sustain the jurisdiction of the circuit court in actions of this character.

1. This court, where the jurisdiction arising from citizenship exists, is a court of full common law and equity powers. In this action the requisite citizenship does exist, and the cause of action is not one created by the bankrupt act, but is essentially a common law action to enforce a contract against the defendant. It is true that the assignee claims title under the proceedings in bankruptcy, much like an executor under proceedings in the probate court, but this does not make the action, properly viewed, a proceeding in bankruptcy. With the consent and under the direction of the proper bankruptcy court, there is no reason why an action like this should not be enforced either in the state

court, or in this court, as may be deemed most expedient. Essentially it does not differ from actions of which both classes of courts constantly take cognizance as part of their original and rightful jurisdiction.

2. The argument against the jurisdiction of this court derives all its force from the supposed exclusive jurisdiction of the district courts, and that such jurisdiction is exclusive, both of the state courts and of this court, except to the limited extent mentioned in the second section of the act.

If Congress had intended by the first section of the act to make the jurisdiction of the district courts exclusive in the collection of assets, and to deprive all other courts of jurisdiction over any action by or against assignees in bankruptcy, it would have been as easy as it would have been natural to employ language to express this purpose. But it will be observed that the word *exclusive* as descriptive of the jurisdiction, is not only not used, but seems to have been carefully avoided.

3. That the state courts are not deprived of jurisdiction in ordinary common law and equity suits, simply because brought by the assignee in bankruptcy, is a proposition that has the support of many well reasoned adjudications made both under the bankrupt act of 1841, and the present act. (*Wood*, assignee, v. *Jenkins*, 10 Met. 583; *Stevens* v. *Savings Bank*, 101 Mass. 109, 1869; *Brown* v. *Hall*, 7 Bush (Ky.) 69, 1869; *Winslow* v. *Clark*, 2 Lansing (N. Y.) 377; *Gilbert* v. *Priest*, 7 Albany Law J. 119, and cases cited; *Piper* v. *Harmer*, 5 Bankr. Reg. 252; S. C. Pa. St. R.; *Mitchell* v. *Great Works, &c.* 2 Story C. C. 668, per STORY, J.; *In re Central Bank*, 6 Bankr. Reg. 207, per BENEDICT, J.; *State* v. *Trustees*, 5 Bankr. Reg. 471; *Carr* v. *Gale*, 3 Woodb. & Minot C. C. R. 64; *Lucas* v. *Morris*, 1 Paine C. C. 396; 1 Kent Com. 379, 400.)

And Mr. Justice CLIFFORD, in the able judgment in which he demonstrated the jurisdiction of the several district

courts of the United States in all matters and cases in bankruptcy, expressly admits that "*state* courts may, doubtless, exercise concurrent jurisdiction with the circuit and district courts in certain cases growing out of proceedings in bankruptcy." (*Sherman* v. *Bingham*, 7 Bankr. Reg. 497.)

And if these courts may exercise a concurrent jurisdiction in any event, it would seem to be in cases where the assignee, with the consent or concurrence of the bankruptcy court, resorted to them for the ordinary purpose of collecting the assets of the estate.

Assuming the decisions in favor of the concurrent jurisdiction of the state courts in certain classes of action by assignees in bankruptcy to be correct, it would be an anomalous result, and one which we can hardly suppose Congress intended, viz., that the state courts should exercise their general concurrent jurisdiction, if the assignee should desire to resort to them, but that this court should not exercise its like jurisdiction.

4. The jurisdiction of this court under the judiciary act is plain. Repeals by implication are not favored. Jurisdiction plainly conferred upon one court cannot be taken away by mere affirmative legislation conferring like jurisdiction upon another court. Speaking of this subject, an eminent judge holds this language; "There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed." Per BRONSON, J., in *Delafield* v. *The State of Illinois*, 2 Hill 161.

For these reasons the motion to dismiss for want of jurisdiction is denied.

LOVE, J., concurs.

MOTION DENIED.

NOTE.—As to state and federal jurisdiction in cases by and against assignees in bankruptcy: *In re Davis*, 1 Sawyer, U. S. Rep. 260; *Norton* v. *Boyd*, 3 How. 437.

Gross *v.* Sioux County.

1. A judgment rendered without jurisdiction over the person sued is void.
2. This rule, illustrated by the case of an action against the county, where the statute required service of process to be made upon the county judge, and the actual service was made upon the chairman of the board of supervisors: *Held*, that a judgment by default against the county without an appearance was void.
3. Whether service upon a county may be made by serving the proper officer when absent from and outside of the county, *quære?*

(*Before* Dillon and Love, JJ.)

Jurisdiction.—Judgment.—Service of Process Upon a County Corporation.

This is an action at law upon a judgment alleged to have been rendered against the defendant in favor of one Lombard by the state district court for Dubuque county, Iowa. The petition is in the usual form, and, after proper averments of citizenship to give this court jurisdiction, alleges that on the 23d day of March, 1869, the district court of the state of Iowa for the county of Dubuque rendered a judgment in favor of Josiah L. Lombard against the county of Sioux for $21,164.22 and costs; that said judgment is in full force, and was, on the 3d day of August, 1871, duly assigned to the plaintiff, who in this action seeks to recover the amount thereof, with interest and costs.

The answer sets up various defences, and the case is now before the court on demurrer to the fourth count of the answer. This count sets up, and the exemplified record of the judgment in Dubuque county, exhibited by the plaintiff, shows, that this judgment was rendered by *that court by default and without any appearance by the county* upon service of the original notice (which is the process for commencing suits in the state courts) made by a private individual outside of the county of Sioux and within the county of Polk.

upon the chairman of the board of supervisors of the county of Sioux. The action in the Dubuque court was upon sundry *county warrants*, in the usual form, by which the treasurer of Sioux county is directed to pay to bearer the amounts therein specified. The original notice was in due form, and was returnable to the Dubuque district court on the 2d day of February, 1869.

The *return of service* thereof is as follows: "State of Iowa, Dubuque County: Benjamin J. Sweet, upon oath, says that he served the within and foregoing notice upon the defendant by reading the same to Miner N. Reamer, who was then and there the chairman of the board of supervisors of said Sioux county, and by delivering to him, the said Reamer, at the same time and place, a true copy of said notice; that said service was so made at the city of Des Moines, in the county of Polk, and state of Iowa, on the 28th day of October, 1868, where the said Reamer was in attendance upon the circuit court of the United States; and I do further depose and say that I am personally cognizant of the fact that said Reamer was then and there chairman of the board of supervisors of said county, and as such was in attendance upon said court, in the interest of said Sioux county. Signed, *Benjamin J. Sweet.*"

This return was subscribed and sworn to by Sweet, and upon it and without any appearance by the county, the district court for Dubuque county rendered judgment against the county by default.

The fourth count of the answer sets up that service was made as above, and claims that the court had no jurisdiction, and that its judgment (the basis of the present action) is void.

Grant & Smith, for the plaintiff.

Joy & Wright, and *Withrow, Gatch, & Wright*, for the defendant.

DILLON, *Circuit Judge*.—The plaintiff's assignor brought suit in Dubuque county against the county of Sioux upon its ordinary warrants, payable at its own treasury upon service of process made in Polk county upon the chairman of the board of supervisors of the defendant. The suit was brought in the wrong county, but if the service upon the defendant was sufficient and it did not move to change the venue to the proper county, the judgment would, under the statute of Iowa, be valid. (Rev. of 1860, sec. 2802.)

The only question now before the court is, Had the Dubuque district court jurisdiction of the county? If it had, the fourth count of the answer is bad; if it had not, that count presents a good defence, and the demurrer thereto should be overruled. The law then in force respecting the mode of service upon a county was section 2824 of the Revision, which provides: "If a county is defendant, service [of the original notice] may be made on the county judge or clerk of the county court." This section was enacted when the county judge was the fiscal agent of the county and had the general management of its affairs. In 1860 the legislature abolished the system of managing the county affairs by a county judge, and adopted instead thereof the supervisor system. The board of supervisors, consisting of a member from each civil township of the county, transact the business of the county at regular or special meetings, and there were devolved upon the county board of supervisors the jurisdiction and powers of the county judges. (Rev. of 1860, pp. 48–53.)

There was no special act changing the mode of making service upon counties until 1870, when section 2824, *supra*, was amended thus: "If a county is defendant, service may be made on the chairman of the board of supervisors or county auditor." (Laws 1870, p. 209.) But this enactment was after the rendition of the judgment now before us, and

the question must be decided upon section 2824 as it originally stood. And upon reading the acts respecting the board of supervisors, we find no provision substituting the chairman of the board, who is simply its presiding officer, in the place of the county judge, or investing him with the powers or functions of that officer. If service of notice against the county could be made upon the supervisors at all, it must be made upon the board. Previous to the act of 1870, there was, so far as we can discover, no more authority to serve the chairman of the board than any other member of the board. Under these views, the court would have acquired no jurisdiction over the county had the chairman been served with notice within the county.

We are also inclined to the opinion that there was no authority of law to make service upon the chairman of the board when absent from his county. The statute contemplates that personal actions in the state courts shall be brought within the county where the defendant resides, and the official duties of the county officers are to be performed at home. Was it the intention of the legislature that the county judge or the county clerk, or, since 1870, the chairman of the board, or county auditor, could be served with process when away for business or pleasure, hundreds of miles from his official home, the place where he discharges his official duties and exercises his official powers? We doubt it; but it is unnecessary to place our judgment upon this ground or give any positive opinion upon it. (See *Board of Supervisors* v. *Tanny*, 31 Ill. 194.)

DEMURRER OVERRULED.

NOTE.—See *Lynde* v. *Winnebago Co.* 16 Wall, 1872.

ALONZO CRAGIN, Assignee of S. & B. Stern, Bankrupts, Plaintiff in Error, *v.* JOHN THOMPSON, Defendant in Error.

1. An assignment by a debtor, under a state law, of his property for the benefit of his creditors, is an act of bankruptcy.
2. Remedies of the assignee in bankruptcy to recover the property from the assignee under the state law, discussed.
3. Where the assignee, in an assignment made under the state law, qualified and became an officer of the state court, and received possession of the assigned property before the commencement of proceedings in bankruptcy against the debtor, and such state assignee, acting in good faith, sold the assigned property under the orders of the state court, and by its direction paid over the proceeds to creditors who proved up under the assignment, and this was done before the assignee in bankruptcy brought suit against him: *Held*, that he was not liable, as in trover, for the value of the property received under the deed of assignment.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Assignment Under State Law.—Rights and Remedies of Assignee in Bankruptcy.—Liability of Assignee Under State Law.

THIS is a writ of error to the district court for the district of Iowa. The plaintiff is the assignee in bankruptcy of the late firm of S. & B. Stern, and the defendant was the assignee in a deed of voluntary assignment made by the said firm before they were proceeded against in bankruptcy. The present action is in the nature of trover for the value of the property assigned to the defendant. In answer, the defendant denied all liability, and set up as a special defence that before the adjudication of bankruptcy the Messrs. Stern made a general assignment of all their property to the defendant for the benefit of all of their creditors under the provisions of the laws of Iowa; that the defendant accepted the trust in good faith, gave bond, and qualified and became an officer of the district court of the state for the county of

Dubuque and subject to its orders, and that before this action was brought, the defendant, by the order of said court, had fully administered all of said property and distributed the proceeds among the creditors of the said S. & B. Stern.

A jury was waived and the cause tried to the court. The court below made a special finding of facts and gave judgment for the defendant. The facts specially found are sufficiently referred to in the opinion of the court. To reverse this judgment, the assignee in bankruptcy brings the case here by writ of error.

Shiras, Van Duzee, & Henderson, for the plaintiff in error

Griffith & Knight, for the defendant in error.

DILLON, *Circuit Judge*.—As this case comes here on a writ of error, only questions of law can be reviewed. The sole question of law presented by the record is, whether, assuming the truth of the facts specially found by the district court, the defendant is personally liable to the assignee in bankruptcy for the value of the property he received from the Messrs. Stern. The material facts are these: The assignment to the defendant under the statute of Iowa, and the defendant's qualification as such assignee by filing in the state court the requisite bond, and his possession of the assigned property under the deed of assignment, all preceded the initiation of proceedings against the assignors under the bankrupt act. After the adjudication the assignee in bankruptcy demanded of the defendant the property, which he refused to surrender. To compel such surrender summary proceedings were instituted in the federal district court, but were subsequently dismissed in order that the present action might be brought, which was commenced therein February 24, 1872. Meanwhile, however, acting under the orders of the state district court, the defendant had sold the property assigned to him, and had

distributed the proceeds under the orders of that court. This was before the present action was brought. The fact is expressly found that the defendant acted in good faith, that he had no interest in the assignment and derived no benefit from it, and that he pursued the state law and paid over the proceeds of all property which came to his hands under the orders of the state court to the creditors who proved their debts under the assignment. Under these circumstances the question for decision is, whether the defendant is personally liable to the assignee in bankruptcy for the value of the property assigned to him, or its proceeds.

1. It has been decided in this circuit that a voluntary assignment by a debtor, under state laws, though free from fraud in fact and embracing all of his property, and made for the benefit of all of his creditors, is an act of bankruptcy within the meaning of the bankrupt law. (*In re Burt*, 1 Dillon, C. C. 439; *Hobson* v. *Markson*, *ib.* 421.) The assignee in bankruptcy is entitled, as against the assignee under the state law, to the possession and control of the estate. So ar there can be no doubt.

2. I am of opinion that while such an assignment is an act of bankruptcy, the assignment itself is not absolutely void *ab initio*, but only subject to be avoided by proceedings taken under the bankrupt act. If the assignors are adjudicated bankrupts, the property assigned passes to, and becomes vested in, the assignee in bankruptcy, and he is entitled to its possession so that it may be used by him to pay the debts which shall be proved against the estate in the bankruptcy court. The proceedings under the state law which contemplates that creditors shall *there* prove their debts and receive dividends are inconsistent with the proceedings under the bankrupt act, which requires all assets to be administered and all debts established in the bankruptcy court. There cannot be two concurrent administra-

tions of the same estate, and of course the state enactment must give way in cases where it is brought into collision with the bankrupt act.

If the present action were against the creditors who received dividends under the assignment, there could, as it now seems to me, be little or no doubt as to their liability. But is the defendant liable, since he had no property in his possession when this action was brought, and had, before that time, paid over in good faith all the proceeds of the assigned property under the orders of the state court? It is my judgment that the defendant should not, under these circumstances, be held personally liable. It is not necessary so to hold in order to prevent the bankrupt act from being evaded or its operation defeated. One plain remedy for the assignee in bankruptcy was to apply to the state court which, down to the adjudication of bankruptcy, at all events, if not afterwards, was rightfully exercising its jurisdiction over the assigned estate, and ask for an order upon the assignee under the state law, to surrender the estate to him. If improperly denied, the assignee in bankruptcy would have a remedy by appeal to the supreme court of the state, whose final judgment, if against him, would be subject to revision by the supreme court of the United States. I do not say, nor in this case is it necessary to affirm, that this would be the only remedy of the assignee in bankruptcy. If the property whose value is sought in this case were still in the hands of the defendant, it may be that he would be liable in respect to it if he should refuse to surrender it to the assignee in bankruptcy. This would depend upon the question, whether, after the adjudication of bankruptcy and the appointment of an assignee (thus superseding the rightfulness in law of any further administration under the state statute), the property assigned was in the custody of the law, *i. e.* of the state court and its officer, the assignee under the state law.

I have strong doubts, notwithstanding the argument of the district judge, whether property in the hands of an assignee under the state law is *in custodia legis* after the adjudication of bankruptcy, so as to exempt such assignee from liability to the assignee in bankruptcy or from proceedings in the federal courts to protect the rights of creditors under the bankrupt act. If the state assignee should surrender the property, he ought to be protected in so doing by the state court, but if it denied him such protection he could take the case, if necessary, to the supreme court of the United States. On the other hand, if the mere making of a voluntary assignment under the state laws withdraws the property and the assignee wholly from the operation of the bankrupt act and the machinery it has provided for the collection and distribution of assets under the supervision of the court it has established for that purpose, the bankrupt act would, to this important extent, seem easy of evasion. But I do not need to pursue the subject further or inquire what remedies the assignee in bankruptcy would have under other circumstances. What I hold is, that under the special findings of the district court — which not only exonerated the defendant from bad faith, but affirmatively found that he acted in good faith and under the orders of the state court, whose jurisdiction and right to act were in no way questioned therein by the assignee in bankruptcy — the defendant is not personally liable to the present plaintiff. He must now seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act.

AFFIRMED.

NOTE.—See *Marshal* v. *Knox*, U. S. Sup. Court, Dec. Term, 1872, 16 Wall.; S. C. 12 Am. Law Reg. 630; *Johnson* v. *Bishop*, Woolw. 324; *Peck* v. *Jenness*, 7 How. 612.

THOMAS PHELPS v. O'BRIEN COUNTY.

1. *State legislation* cannot affect the *jurisdiction* of this court; and a person who has the right under the judiciary act to sue in this court cannot be compelled by an act of the state legislature first to obtain leave of a state court.
2. Upon this principle a provision of the state statutes requiring leave of court to enable a party to sue upon a judgment rendered in any court of the state, is not applicable to the circuit court of the United States.

(*Before* DILLON and LOVE, JJ.)

Jurisdiction.—State Legislation.

ACTION on a judgment rendered August 5th, 1873, in favor of the plaintiff's assignor, a citizen of Wisconsin, against the county of O'Brien, by the district court of the *state* of Iowa, for the county of Dickinson, and assigned to the plaintiff, a citizen of Illinois. Defendant demurs, on the ground that the action is brought on a judgment rendered in a court of record of the state, within fifteen years from the rendition thereof, without showing leave of the court to bring the same.

H. D. Perkins, and *J. H. Swan*, for the demurrer.

Nourse, Kauffman, & Holmes, opposed.

DILLON, *Circuit Judge.*—Section 2521 of the code of Iowa enacts: "No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of this state, within fifteen years after the rendition thereof, without leave of the court, for good cause shown, and on notice to the adverse party, except in cases when the record of such judgment is, or shall be, lost or destroyed."

The 11th section of the judiciary act provides that "The circuit court shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature

at common law * * * between a citizen of the state where the suit is brought, and a citizen of another state."

The case made in the petition falls within the jurisdiction of this court as thus prescribed, and this jurisdiction cannot be in any manner limited or affected by state legislation. But in cases at common law properly cognizable in this court, the laws of the several states, where applicable, form rules of decision here, as, for example, the limitation laws of the states are as available to a defendant in this court as in the state court where there is no act of Congress to the contrary. It is our opinion that the section of the code (2521) above mentioned is and must be limited to suits in the state courts of the character therein contemplated. A person who has the right under the constitution and laws of the United States to bring his action in this court cannot be compelled first to obtain the leave of a state court. In principle this case is settled by several adjudications of the supreme court of the United States. (*Railway Company* v. *Whiton*, 13 Wall. 270, 285; *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank, &c.* v. *Jolly's Administrators*, 18 How. 506; *Payne* v. *Hook*, 7 Wall. 425.)

LOVE, J. concurs.

DEMURRER OVERRULED.

ALONZO CRAGIN, Assignee, &c. *v.* CARMICHAEL, BROOKS, & Co. Plaintiffs in Error.

1. Where the assignee in bankruptcy brings an action under section 35 of the bankrupt act specifically to recover the value of property conveyed by the bankrupt to the defendant by way of illegal preference under the act and issue is taken thereon, the *assignee must recover on the case stated in his declaration*, and cannot under such an issue recover on the ground that the conveyance to the defendant was void at common law, or under the statutes of the state.

2. The assignee in bankruptcy *represents the rights of creditors*, and may attack conveyances made by the bankrupt in fraud of his creditors, although the creditors are creditors at large of the bankrupt.
3. The construction of the statutes of the state of Iowa by the supreme court as to the validity of an *unrecorded chattel mortgage* against creditors with notice thereof, followed in a case where the assignee in bankruptcy, in an action in that state, sought to avoid the mortgage, because invalid under the statutes of the state.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act, Section 35.—*Pleadings.*—*Variance.*—*Right of Assignee to Avoid Fraudulent Conveyances of the Bankrupt.*—*Chattel Mortgage.*—*Validity Under Laws of Iowa.*

WRIT OF ERROR to the district court for the district of Iowa.

Alonzo Cragin, the defendant in error, is the assignee in bankruptcy of Smith Patterson, lately a merchant at Tama City, Iowa. The plaintiffs in error, Carmichael, Brooks, & Co. were bankers at the same place, and held a chattel mortgage upon the stock in trade of Patterson, the validity of which was contested by the assignee.

The material facts are these: The action by the assignee in the court below against the defendants was brought under the 35th section of the bankrupt act, and alleged in substance that the defendants, Carmichael, Brooks, & Co. on the 15th day of November, 1872, seized upon the greater part of Patterson's stock of hardware with a view to secure a preference, as Patterson was insolvent, and they had reasonable cause to know or believe him to be so.

The petition asks to recover the value of the goods so seized, solely on the ground of the alleged preference sought to be gained, contrary to the bankrupt act. It contained no reference to the defendants' mortgage.

The defendants' answer was:—

1. In general denial of all the allegations of the petition.

2. A special defence, to the effect that on May 24th, 1872, Patterson being indebted to the defendants, bankers, for advances of money, executed to secure such indebtedness a chattel mortgage on his stock of goods and delivered it to the defendants on that day; that this mortgage being duly acknowledged was recorded October 4th, 1872; that the mortgage was taken by the defendants *bona fide*, and with no reason to believe Patterson to be insolvent; that on the 15th day of November, 1872, there was due the defendants thereon $3,700, and that the defendants on that day seized the mortgaged property to foreclose the mortgage, and that said mortgage was made and delivered to the defendants more than four months before the filing of the petition in bankruptcy against Patterson.

On these issues there was a trial to the jury, and a verdict and judgment for the assignee for $3,792.60. To reverse this judgment for alleged erroneous instructions to the jury, the defendants bring the case to this court by writ of error.

Platt Smith, and *Fouke & Chapin*, for the plaintiffs in error.

Shiras, Van Duzee, & Henderson, for the assignee (defendant in error).

DILLON, *Circuit Judge.*—The chattel mortgage of the bankrupt to the defendants below was executed and delivered to them on May 24th, 1872, more than four months before the filing of the petition in bankruptcy. This mortgage was duly recorded October 4th, 1872, within four months of the bankruptcy. On the 15th day of November, 1872, the defendants below took actual possession under their mortgage, and were in possession when the petition for adjudication of bankruptcy was filed, which was on the 19th day of the same month.

Two errors are assigned, which I proceed to notice. The court below properly instructed the jury that the plaintiff's petition counts solely upon facts which entitle him to recover, under section 35 of the bankrupt act, the exclusive ground of the action being an alleged illegal preference to the defendants under that enactment. And following the views of CHASE, C. J., in *Re Wynne*, 4 Bankr. Reg. 5, the court instructed the jury that the preference, if any was given by the mortgage, was given when that instrument was made and delivered on the 24th day of May, from which period the four months limitation began to run, and not from the period when it was recorded, since the recording was not the act of the bankrupt, but alone the act of the creditor. And accordingly the jury were told that if they found "that the giving of the mortgage was more than four months before the 19th day of November, 1872, [the day the petition in bankruptcy was filed], the plaintiff cannot recover under the bankrupt act on the ground of illegal preference."

As this instruction was in favor of the defendants, the giving of it, even if it was erroneous, cannot be assigned to by them as error. But the defendants below claimed that *under the pleadings* an illegal preference under the bankrupt act was the only ground upon which a recovery was sought, and therefore the instructions which the court gave, to the effect that the answer so far helped the plaintiff's case that it put the validity of the defendant's mortgage as a statutory instrument in issue, and that if this was not valid under the laws of Iowa as against creditors, plaintiff might recover on that ground. In this the court erred. The first count of the answer was a general denial, and this put in issue all the material allegations of the petition, and devolved on plaintiff the necessity of recovering, and of recovering alone, upon the case stated in the petition. The petition could have been so framed as to assail the mortgage, both

because it was fraudulent under the bankrupt act and under the common law or statute of the state. But as it was not thus framed, the special affirmative defence set up in the answer could not be relied on by the plaintiff as a separate ground of recovery.

The other error assigned relates to the court's instruction as to effect under the statutes of Iowa of not recording the mortgage. On this subject the court charged the jury as follows: —

"If you find that the mortgage was in fact executed on the 24th day of May, A. D. 1872; that the defendants kept it in their own possession without filing it for record until the 4th day of October, 1872; that debts accrued against the bankrupt in the intervening time, and that the creditors whose debts were so contracted had no notice of the existence of the mortgage; that in the meantime the mortgagor retained possession and control of the mortgaged property; that the defendant seized the property under and by virtue of the mortgage alone, witheld it from the assignee and refused to deliver it on his demand, and that the claims of the creditors intervening between the execution and filing of the mortgage for record remain unsatisfied — then the plaintiff is entitled to a verdict."

The correctness of this instruction must be determined by the statutes of the state respecting chattel mortgages, and the recording thereof; and the question whether the mortgage to the defendants was void as to creditors is just the same as if no assignee in bankruptcy had been appointed, and it had been attacked by attaching or judgment creditors. When a conveyance is attacked for fraud, outside of the bankrupt act, by the assignee in bankruptcy, he represents the rights of general creditors, and may for such fraud avoid the instrument, though he has no specific lien on the property thereby conveyed.

The state statute contains the following provisions applicable to the present inquiry: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless recorded," &c. (Rev. of 1860, sec. 2201.) Another section (2203) enacts that from the time such mortgage is duly recorded "it shall be deemed complete as to *third persons*, and shall have the *same effect* as though it had been accompanied by an *actual delivery* of the *property mortgaged.*" These provisions have been frequently before the supreme court of the state, and have received a settled construction. (*Hughes* v. *Cory*, 20 Iowa, 399; *Allen* v. *McCalla*, 25 Iowa, 465.) These cases settle the law in the state of Iowa to be that an unrecorded mortgage of chattels, where the mortgagor retains possession, is valid against attaching creditors with notice of its existence at any time before levy. Accepting this construction, as I think we must as a rule of decision here, it is clear that the charge of the court below, however correct on common law principles aside from statute regulation, is not consistent with the exposition of the statute by the supreme court of she state.

In this case it will be remembered that the mortgage was recorded nearly six weeks before the petition in bankruptcy was filed, and that at that time the defendants were in actual possession under their mortgage. From the time it was recorded all parties were bound to take notice of it, and from that time it became "complete as to third persons, and had the same effect as though it had been accompanied by an actual delivery of the property mortgaged." Besides, the mortgagee was in actual possession when the bankruptcy proceedings were commenced. If a sheriff, on the 19th day of November, had attached or levied upon the goods for a creditor, he would have been bound to take notice of the mortgagee's rights, and if the mortgage was not fraud-

ulent in fact because made or used to hinder, delay, or defraud creditors, the attachment or levy would be subordinate to the mortgage.

Now, as above observed, the assignee in attacking a conveyance as invalid under the laws of the state, has precisely the rights which an attaching creditor would have had, and no greater; and as to such a creditor the mortgage would not have been invalid merely because his debt was created without notice of it, and before it was recorded. As to the assignee in bankruptcy, he must show something more to defeat a mortgage on record, when the bankruptcy proceedings were commenced, than that debts were created without notice of it before it was recorded.

The judgment below is reversed, and cause remanded for a new trial.

REVERSED.

NOTE.—The principal cases construing the statutes of the state as to chattel mortgages, and the effect of mortgagor retaining possession, are: *Miller* v. *Bryan*, 3 Iowa, 58; *Crawford* v. *Burton*, 6 Iowa, 476; *McGavran* v. *Haupt*, 9 Iowa, 83; *Kuhn* v. *Graves*, 9 Iowa, 303; *Campbell* v. *Leonard*, 11 Iowa, 489; *Torbett* v. *Hayden* (leading case), 11 Iowa, 435; *Hughes* v. *Cory*, 20 Iowa, 399; *Allen* v. *McCalla*, 25 Iowa, 464.

HYDE *v.* PHŒNIX INSURANCE COMPANY.

1. Where the defendant *removed a cause* to this court from the state court under section 12 of the judiciary act, but failed to have the transcript of the record of the pleadings and proceedings filed herein on the first day of the term, leave was given to the *plaintiff* to have the same filed and the case docketed.
2. The *practice* of the court in cases thus removed, stated.

(*Before* DILLON and LOVE, JJ.)

Removal of Suits from State Court.—Practice.—Filing Transcript.

THIS suit was commenced in one of the courts of the state, and, on entering its appearance therein, the defendant made application for its removal, under section 12 of the judiciary act, to this court; and an order for the removal was accordingly made. The present is the next term of this court after the removal. The clerk of the state court has sent to the clerk of this court a certified copy of the papers and proceedings in the state court, but the same was not accompanied with any instructions or fee, and there has been no appearance here as yet by the defendant. The plaintiff now asks leave to file the transcript thus transmitted of the pleadings and proceedings in the state court, and if granted to move thereon, either to remand the cause or to default the defendant if no appearance shall be entered, or answer filed.

Gatch & Wright, for the motion. No appearance for the insurance company.

DILLON, *Circuit Judge.*—The court perceives no objection, under the circumstances, to granting leave to the plaintiff to file the transcript from the state court and to have the suit docketed. The plaintiff may, thereupon, move either to have the cause remanded to the state court or elect to treat it as pending in this court. In the latter event, as the issues were not made up before the removal, the case, under the practice (should there be an answer filed to the merits), is not triable at this term unless by consent; but the issues must be settled during the term, and if the company shall not appear and answer when required, it may be defaulted.

The motion to file the transcript is sustained.

LOVE, J. concurs.

MOTION SUSTAINED.

NOTE.—Practice in cases removed from the state court: *McBratney* v. *Usher*, 1 Dillon, 367; Rule, *ib.* 594.

U. S. *ex rel.* SAMUEL E. HALL *et al.* Relators, v. UNION PACIFIC RAILROAD COMPANY.

1. The judiciary act confers no jurisdiction on the circuit court to issue a writ of *mandamus* as an *original* proceeding; and the 5th section of the act of Congress of June 1, 1872, does not confer original jurisdiction in *mandamus* proceedings.
2. The act of June 1, 1872, does not have the effect to make the provisions of the *state statutes* relating to pleadings and practice in actions of *mandamus* applicable to the ancillary jurisdiction of this court in *mandamus* proceedings, but the practice of the court remains substantially as at common law.
3. The act of Congress of March 3, 1873, confers original jurisdiction on the proper circuit court of the United States of cases of *mandamus* to compel the Union Pacific Railroad Company to operate its road according to law.

(*Before* DILLON and LOVE, JJ.)

Mandamus.—Practice.—Effect of Act of June 1, 1872, *Upon Practice in Mandamus Proceedings.*

A PETITION, or information, under oath, is filed in this court by Samuel E. Hall and John W. Morse, who describe themselves as citizens of the United States and of the state of Iowa, making the Union Pacific Railroad Company defendant or respondent. It sets out the acts of Congress relating to the Union Pacific Railroad, and alleges that the eastern terminus of the road is within the corporate limits of the city of Council Bluffs, in the state of Iowa, and on the eastern side of the Missouri river; that the said railroad company neglects and refuses to operate its road from its eastern terminus at Council Bluffs as one continuous line, but on the contrary, operates its road from Omaha, in Nebraska, although the railroad company owns a bridge across the Missouri river between these two cities; that the company runs and operates the portion of its road over the bridge as a distinct and independent line, under the name

of "The Omaha Bridge Transfer," thereby "causing great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large, and especially to your petitioners, who are merchants doing business at Council Bluffs, and who constantly are obliged to ship and receive goods transported over said road." It is not essential to refer to the petition more at length. Its purpose sufficiently appears by the prayer, which is as follows: —

"*Wherefore your petitioners pray*, That a writ of *mandamus* may issue from this honorable court directed to the said Union Pacific Railroad Company, its officers and agents, strictly enjoining and commanding them henceforth to operate the whole of their said road, from Council Bluffs westward, and including that portion of their said road between Council Bluffs and Omaha, and constructed over and across the said bridge as one continuous line for all purposes of communication, travel, and transportation; and especially commanding them to start their regular freight and passenger trains westward bound from said Council Bluffs, to run their eastward-bound trains of both descriptions through and over said bridge, to Council Bluffs, and to run and operate said trains to and from said Council Bluffs under one uniform time schedule and freight and passenger tariff with the remainder of said road, and to wholly desist and refrain from operating said road as an independent and separate line, and from causing or requiring freight or passengers bound westward or eastward to be transferred as aforesaid at said Omaha; and otherwise commanding said defendants as to the court shall seem just and agreeable to law and required by the circumstances of the case."

A notice directed to the defendant was served upon its general agent at Council Bluffs, stating that an application

would be made to the court this term for a peremptory writ of *mandamus*, as prayed.

Putnam & Rogers, *Sapp*, *Lyman*, *& Hanna*, and *A. V. Larimer*, for the petitioners.

J. M. Woolworth, *A. J. Poppleton*, *Contra*.

DILLON, *Circuit Judge*.—By act of Congress approved March 3, 1873 (17 Stats. at Large, 509), it is provided that the "Proper circuit court of the United States shall have jurisdiction to hear and determine all cases of *mandamus* to compel said Union Pacific Railroad Company to operate its road as required by law." It is under this act that the present proceeding is instituted.

There has been no appearance by the defendant in the court, but on the day fixed in the notice as the one on which the petitioners would apply for a writ of *mandamus*, counsel in the interest of the defendant have asked leave to suggest for the consideration of the court the question whether, assuming the proceeding to be regular and one which is authorized, and the court to have jurisdiction in the matter, the court can, prior to the final determination of the controversy, award a writ of *mandamus*. This suggestion is based upon the statute of the state (Code of 1873, p. 573) relating to "Actions of *Mandamus*," and the effect of claimed for the 5th section of the act of Congress of June 1, 1872 (16 Stats. at Large, 197).

By the statute of the state, proceedings by *mandamus* are assimilated to regular actions at law, both in respect to pleadings and procedure. The alternative writ is abolished, and an order of *mandamus*, which is a substitute for the peremptory writ, issues only after trial, and the right to such order has been adjudged to the plaintiff.

The 5th section of the act of Congress of June 1, 1872, above mentioned, enacts "That the practice, pleadings, and

forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The act of Congress first above mentioned gives to the "Proper circuit court * * * jurisdiction to hear and determine all cases of *mandamus* to compel the Union Pacific Railroad Company to operate its road as required by law." It will be assumed that this is a proper court to take cognizance of the proceeding here commenced, and the question which meets us and which must be determined before any further steps can be taken, is, whether the proceedings shall be conducted in conformity to the state statutes relating to *mandamus*, or according to the practice at common law. If according to the latter, then in due course an alternative writ issues, which stands in the place of a petition or declaration, to which, if served, return must be made, and the rights of the parties thereon determined in the usual manner; but if according to the state statute, then no writ can be awarded until the right to it is established by the final judgment of the court.

The question as to the effect of the act of June 1, 1872, upon the practice in *mandamus* proceedings in this court, is one of interest, and we proceed to consider it.

Under the judiciary act, which prescribes the jurisdiction of this court, it is settled that it cannot issue the writ of *mandamus* at all in the exercise of original jurisdiction; that the power to issue this writ is confined exclusively to cases where the *jurisdiction already exists*, and that jurisdiction cannot be acquired by means of this writ. (*Bath County* v. *Amey*, 13 Wall. 244; *Riggs* v. *Johnson County*, 6 Wall. 166, 197.)

Now the 5th section of the act of June 1, 1872, regulating

pleadings and procedure, cannot have the effect to *confer* on this court jurisdiction in *mandamus* cases; the jurisdiction must otherwise exist by virtue of the judiciary act or some other act of Congress, and then the court may issue the writ when necessary to the exercise of such jurisdiction and agreeable to the principles and usages of law. (Judiciary Act, section 14; *Bath County* v. *Amey*, *supra.*)

The provisions of the state statute which contemplates that there shall be original process and regular pleadings, and a final determination or judgment before the writ or order is awarded, are in the main wholly inapplicable to the ancillary jurisdiction of this court in *mandamus* proceedings. So that in general, the practice in this court in *mandamus* proceedings is not affected by the act of June 1, 1872, but remains as before. And by its terms, that act refers to causes of a common law nature (sec. 11, Judiciary Act); and by the express decision of the supreme court, *mandamus* proceedings are not included in the section of the judiciary act which prescribes the jurisdiction of this court. (*Bath County* v. *Amey*, *supra*, and cases there cited.) The general practice of the court in *mandamus* proceedings being regulated by the principles and usages of law, and not by the state legislation, is there anything in the nature of this case which should make it an exception?

It is true that the act of 1873 gives the proper circuit court original jurisdiction of this particular case of *mandamus*, but as it is not one of the cases which falls within the jurisdiction of this court in common law actions as conferred by the judiciary act, and is not one of those to which the act of June 1, 1872, was intended to refer, and so does not fall within it; and as the duty sought to be enforced arises wholly under acts of Congress, and can be in no way influenced by state legislation, it is our opinion that this proceeding should be made to conform to the practice at

common law as liberalized and modified in more recent times by legislation and judicial decisions.

A motion for a rule upon the Union Pacific Railroad Company to appear and show cause why an alternative writ should not be granted, or for an alternative writ to be granted without the rule, is the proper step next to be taken by the relators.

LOVE, J. concurs.

NOTE.—The motion for the alternative writ is now under advisement by the court on the question, whether the petitioners may be relators, and as to jurisdiction of the court over the respondent.

Construction of act of July 1, 1872, see *Schwabacker* v. *Reilly*, *ante*; *Bronson* v. *Keokuk*, *ante*.

APPENDIX.*

In re Clemens.

An accommodation indorser of negotiable paper, whose indorsement is in no no way connected with the business of the indorser, cannot be forced into bankruptcy for suspending and failing to resume payment of such paper. Such paper is not "*his* commercial paper," within the meaning of the ninth clause of section 39 of the bankrupt act.

(*Before* Dillon, *Circuit Judge.*)

Bankrupt Act.—Section 39 *Construed.—Accommodation Indorsers.*

This is a petition by John Clemens under section 2 of the bankrupt act, to have reviewed an order of the district court by which his answer to a petition to show cause why he should not be adjudicated a bankrupt, was held insufficient. The material facts are these: —

Morris Langsdorf filed his petition in the district court of the United States against John Clemens, praying that he might be decreed a bankrupt. The petition alleges that one Christian Stæhlin made his note for $3,000, dated St. Louis, February 14, 1873, which was indorsed by respondent and three other persons, which note, before its maturity, came to the hands of the petitioning creditor for value, and that the note was subsequently duly protested for nonpayment. A copy of the note and indorsements is set forth in *hæc verba* in the petition.

* In the Appendix are included cases mostly decided since the previous portion of the volume was in print.

The petition also alleges that the respondent, Clemens, being a merchant, manufacturer, and trader, being insolvent and in contemplation of bankruptcy, suspended and did not resume payment of his commercial paper within a period of fourteen days.

The answer of the defendant is as follows: —

"And now comes the respondent, John Clemens, and shows cause why he should not be declared a bankrupt, and states: *First.* That he indorsed the note described in the petition, and he also indorsed several others also made by Christian Stæhlin, for the accommodation of said Stæhlin; but the note described in the petition, as well also as the other notes indorsed by this respondent for said Stæhlin's accommodation aforesaid, were not, nor was either of them, made or indorsed in the ordinary course or in connection with the business of this respondent. This respondent admits that the note described in the petition, as well as several others indorsed by him for the accommodation of said Stæhlin, as aforesaid, became due and remained unpaid for a period of fourteen days and more before the filing of said petition. *Second.* This respondent avers that no note or bill made by him has become due and remains unpaid; that the only paper outstanding on which his name appears consists of the note described in the petition, and several other notes made by said Christian Stæhlin and indorsed by this respondent for the accommodation of said Stæhlin, and that all of said paper so indorsed was not made, indorsed, or given for, or on account of, or in settlement of, any debt or liability of this respondent, and said notes were not, nor was either of them, made or indorsed in the ordinary course of, or in connection with, the business of this respondent.

This respondent avers that he is not insolvent, but is fully able to pay his own debts in full, contracted in and about his own business. Wherefore respondent says he is not, by reason of his said accommodation indorsement aforesaid,

subject to the provisions of the act of Congress mentioned in the petition."

To this answer the petitioning creditor filed his general demurrer which presented the question, Whether the note set out in the petition, which was indorsed by the respondent for the accommodation of the maker, is the commercial paper of the respondent in the sense of the bankrupt law.

The district court held the answer to be insufficient, and thereupon Clemens filed in the circuit court his petition for a review of that decision.

H. N. Hart, and *Krum & Patrick*, for the petitioner for review.

A. Binswanger, for the petitioning creditor.

DILLON, *Circuit Judge.*—The respondent below, who is here as the petitioner in review, was sought to be thrown into involuntary bankruptcy, under the clause of section 39 of the bankrupt act, which provides that any person "being a banker, broker, merchant, trader, manufacturer, or miner, who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy."

The respondent belonged to one of the enumerated classes, and the act of bankruptcy charged is that he stopped or suspended, and, for the prescribed length of time, failed to resume payment of his commercial paper. He is an accommodation indorser on a note negotiable in form, made by one Stæhlin and held for value by the petitioning creditor. It is admitted on the record that the note was indorsed by him solely for the accommodation of Stæhlin, and that the note did not originate in the business of the respondent below, and was not indorsed in the course of, or in connection with, his business.

Upon this state of facts, the single point presented by the record is, whether he can be proceeded against *in invitum* and be adjudicated a bankrupt. And this depends solely upon the question, whether he has failed to meet "his commercial paper."

Was the note of Stæhlin indorsed by the respondent below the *respondent's* commercial paper within the meaning of the bankrupt act? This question is not settled by adjudication. There is no such act of bankruptcy in the insolvent laws of Massachusetts, from whence so many provisions of the bankrupt act have been taken, and of course no decisions in that state determining its meaning.

Commenting on this clause of the bankrupt act, Mr. Edwin James (James's Bankrupt Law, p. 261) says: "This act of bankruptcy is confined exclusively to bankers, merchants, and other traders. It is the first time in legislation here or in England that such an act of bankruptcy has been created. By the English bankruptcy acts, the suspension of payment by a banker, merchant, or trader, of his commercial paper and liabilities, is resolved into an act of bankruptcy by summoning him before the court of bankruptcy, and if the debt or demand be not paid or arranged to the satisfaction of the creditor within a prescribed time, the non-arrangement or non-payment within such prescribed period constitutes an act of bankruptcy."

The question now before me has never been decided by the supreme court, nor, so far as I am advised, by any circuit court of the United States. Mr. District Judge WITHEY (*Re Nickodemus*, 3 Bankr. Reg. 55), and Mr. District Judge BLATCHFORD (*Innez* v. *Carpenter*, 4 Bankr. Reg. 139; and see also, *Re McDermott Bolt Co.* 3 *ib.* 33; *Re Lowenstein*, 2 *ib.* 99), have expressed the opinion that the accommodation indorsement of the note of another did not make it, within the meaning of the clause of the act under consideration, the commercial paper of the accommodation indorser. On

the other hand, Mr. District Judge LOWELL (*Re Chandler*, 4 Bankr. Reg. 66; S. C. 1 Lowell's Decisions, 478), and in the case under review, Mr. District Judge TREAT (*Re Clemens*, 8 Bankr. Reg. 279), have reached the opposite conclusion.

The question is by no means free from difficulty; and although I distrust my judgment when it differs, upon a question of bankruptcy law, from that of the learned judge whose ruling is under review, yet I have not been able to concur in his conclusion that the present petitioner was, upon the facts admitted by the demurrer, liable to be adjudicated a bankrupt. While I need not deny that the note of Stæhlin was commercial paper so far as the maker is concerned, although it does not appear that he belonged to any of the six enumerated classes, yet I do not think it became, by the accommodation indorsement of the respondent below "his (Clemens') commercial paper," so that he would be liable to be declared a bankrupt for failing to pay it for fourteen days.

Giving to the words of the act, "stopping or suspending and not resuming payment of his commercial paper," their natural meaning, it seems to me that they do not refer to the case of accommodation indorsers. If a merchant should indorse negotiable paper owned by him in the course of his own business even to borrow money, and his liability be fixed thereon, it may be admitted that it would or might be an act of bankruptcy not to meet it for the period of fourteen days, for the paper thus indorsed by him would be connected with his business. But where we say a merchant, trader, manufacturer, or other person has suspended payment of his paper, the words do not naturally convey to the mind the idea that reference is made to paper which is *his* only because he has indorsed it for the accommodation of another. It is an inapt expression to say that a person has stopped payment of his accommodation paper. Persons do

not make a business of indorsing paper for others, and it cannot be that this exceptional class of indorsements was primarily in the contemplation of the law-maker. To make the act embrace accommodation indorsers is not necessary to give it full effect and operation. The non-payment of commercial paper by persons not within the enumerated classes is not an act of bankruptcy though made in connection with their own business. A railroad company cannot be thrown into bankruptcy for failing to pay its notes or bills — even its own notes and bills; but if it commits an act of bankruptcy by fraudulent transfers or preferences, it may be proceeded against in bankruptcy by its creditors.

So on the respondent's indorsement he is liable, and may be sued; and if, in consequence of such a suit, an illegal preference will be obtained, any creditor may, for *that reason*, force him into bankruptcy. But it is, in my judgment, a misconception of the bankrupt act, to regard it as having been intended to collect debts or to regard a resort to it as among the peculiar privileges which the law throws around commercial paper in the hands of a *bona fide* holder.

The order below sustaining the demurrer to the answer is reversed.

REVERSED.

NOTE.—As to accommodation bill transactions: *Ex parte* Mee, Law Reports, 1 Chancery, 337; *Downing's Assignee* v. *Traders' Bank*, *ante*, 136; *Ex parte Hammond*, 6 DeG. Mac, 699; 24 Law Journal (Bankr.), 2; *Ex parte Mortimore*, 7 Jurist (new series), 320; 9 W. R. 423; 3 L. S. (new series) 828; *Bassett* v. *Dodgin*, 9 Bing. 653; 2 M. & Scott, 777.

BLAKELY WILSON, Plaintiff, *v.* PETER BOYCE, Defendant.

1. Under the act of the Missouri legislature of March 3d, 1857, bonds issued by the state to the several railroad companies receiving them "constituted a *first lien* or mortgage upon the *road and property*" of said companies. Held that the lien of the state under this statutory mortgage extended to lands which had before that time been granted by Congress to aid in the construction of the road, and by the state to the railroad company, and that the lien of the state was not confined to the road and such property immediately connected with the road as was necessary for its operation.
2. A title to such lands derived from the state (which subsequently foreclosed its lien) is superior to a title derived from the railroad company, by deed made by the company, after it had accepted the provisions of the act of March 3d, 1857, giving the state a first lien on the "road and property" of the company.

(*Before* DILLON and TREAT, JJ.)

Lien of the State of Missouri Upon the Railroads for State Bonds.—Legislation of the State Construed.

THIS is an action of ejectment for a tract of land in Scott county, in this state.

The tract in dispute is part of a large body of land acquired by the state of Missouri under the act of Congress, entitled "An act granting the right of way, and making a grant of land to the states of Arkansas and Missouri to aid in the construction of a railroad from a point on the Mississippi, opposite the mouth of the Ohio river, *via* Little Rock, to the Texas boundary, near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi river," approved February 9th, 1853. [Railroad Laws, p. 5.] The lands thus granted by the act of Congress were afterwards granted by the state to the Cairo & Fulton Railroad Company of Missouri, by act of the general assembly of February 20th, 1855.

The plaintiff and defendant each claims under the Cairo & Fulton Railroad Company of Missouri as a common source of title.

The plaintiff claims to have derived the title of the Cairo & Fulton Railroad Company of Missouri by means of the following instruments: —

1. A deed from the Cairo & Fulton Railroad Company, of date May 23d, 1857, to John Moore, John Wilson, and Albert G. Waterman, in trust, with power of sale. [This paper bears date May 23d, 1857, though the resolution of the board, which is the authority on which it rests, was made March 8th, 1858, and the certificates of acknowledgement are dated respectively April 30th, May 7th, and 14th, 1858, so that for some reason the document was given a false date.]

2. An instrument purporting to be a deed from Moore, Wilson, and Waterman, trustees, of date November 25th, 1859, to one H. S. Hamilton.

3. A deed bearing date March 29th, 1860, from H. S. Hamilton to Walter A. Stevens.

4. A deed of date November 23d, 1860, from Walter A. Stevens to Blakely Wilson, the plaintiff.

The defendant, who is tenant in possession, claims that Thomas Allen, his landlord, has derived the title of the Cairo & Fulton Railroad Company of Missouri by means of two certain statutory mortgages put upon its property by the railroad company, and by the proceedings that were subsequently had for the foreclosure of said mortgages.

The first of the two mortgages was created under the act of the general assembly, entitled "An act to expedite the construction of the Cairo & Fulton Railroad of Missouri," passed December 11th, 1855. The first section of the act made provision for the issuing of the bonds of the state, and the delivery of them to the railroad company, to aid the company in the building of its road. The second section forbade the delivery of the state bonds to the company

until the acceptance thereof should be signified to the secretary of state by a certificate of the company filed in the secretary's office. The third section provides that "Each certificate of acceptance so executed and filed as aforesaid, shall be recorded in the office of the secretary of state, and shall thereupon become and be, according to all intents and purposes, a mortgage of the road, and every part and section thereof, and its appurtenances to the people of this state, for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted as aforesaid." State bonds, amounting to $250,000, were delivered to the railroad company under this act, *after* March 3d, 1857.

The second of the two mortgages arose under the act of the 3d day of March, 1857, entitled "An act to amend an act to secure the completion of certain railroads in this state, and for other purposes," approved December 10th, 1855. By the 20th section of the act there was "granted to the Cairo & Fulton Railroad Company an additional loan of $400,000." By the 17th section it was provided that "All bonds issued under the provisions of this act shall constitute a first lien or mortgage upon the *road and property* of the several companies so receiving them, in the same manner as provided by the act approved February 22d, 1851, to expedite the construction of the Pacific Railroad, and of the Hannibal & St. Joseph Railroad, and the act approved December 10th, 1855, of which this is amendatory."

On the 19th day of October, 1857, the board of directors adopted a resolution accepting the provisions of the act of the 3d day of March, 1857, as required by the 16th section of the act and afterwards, in due time, filed a copy of it in the secretary's office, and thereupon the amount of bonds granted by the act were issued and delivered to the railroad company, and the company in due form filed in the secretary of state's office the certificates of acceptance required by the 4th section of the act of February 22d, 1851.

The railroad company having made default in the payment of the interest on these bonds, and remaining in default for a number of years, the general assembly passed the act of the 19th day of February, 1866, called the "sell-out law" (laws of adjourned session of 1866, p. 108), by which provision was made for the foreclosure of the mortgages and for the sale of the mortgaged property. Pursuant to the provisions of the act just cited, a sale of everything that belonged to the railroad company in foreclosure of these mortgages was made, at which the State became the purchaser, and the State thereupon re-sold to McKay, Reed, Vogel, and Simmons, who afterwards sold and conveyed to Allen, the defendant's landlord.

Tho plaintiff's counsel, in the progress of the trial, conceded that if the State's mortgages covered the property in dispute, the defendant's landlord had, by means of the proceedings shown in evidence, acquired a good title.

Mr. Clover, for the plaintiff.

Dryden & Dryden, for the defendant.

Dillon, *Circuit Judge.*—This is an action of ejectment. The parties have stipulated that the title to the land in controversy was at one time in the Cairo & Fulton Railroad Company, and it is under the company that each party claims to derive title—the plaintiff under a deed made by the trustees of the company, November 25th, 1859, to one Hamilton; the defendant under an alleged first mortgage lien in favor of the state of Missouri and its subsequent foreclosure, and the sale of the land by the State to the grantors of the defendant's landlord.

It was admitted on the trial by the learned counsel for the plaintiff, that if the State had a lien upon this land by virtue of the statutory mortgages in its favor, created either by the act of December 11th, 1855, or the amendatory act of March 3d, 1857, the title was subsequently acquired under

a foreclosure of its lien by the State, and by it conveyed to the grantors of the landlord of the defendant. One question, if decided in favor of the defendant, as we think it must be, is decisive of the case, and that is: Did the lien or mortgage in favor of the State under the act of 1855, or 1857, embrace or extend to the lands of the company which were granted by Congress to the state, and by the state to the company, to aid in the construction of its road?

The point of the controversy is just here: The plaintiff admits that the State had, by virtue of these acts, a first lien upon the road and all the lands necessary to its use and operation as a railroad, but denies that this lien extended to the *lands* of the company, which had been granted to it by Congress to aid, by a mortgage or sale thereof, in the construction of its road. On the other hand, the defendant contends that to secure the State for the bonds issued to the company under the acts named, the State stipulated for, and the company consented to give, a first lien, not only upon the road and its appurtenances, but as well upon the other property of the company, including its lands.

By the act of December 11th, 1855, when accepted by the company as it was, there was created a first mortgage in favor of the state upon "the road and every part and section thereof, and its appurtenances." But, by the amendatory act of March 3d, 1857, the language was changed, and it was provided that "all bonds issued under the provisions of this act shall constitute a first lien or mortgage upon the *road and property* of the several companies so receiving them, in the same manner as provided by the act approved February 25th, 1851, to expedite the construction of the Pacific Railroad, and the Hannibal & St. Joseph Railroad, and the act approved December 10th, 1855, of which this is amendatory."

All of the state bonds to the Cairo & Fulton Railroad Company were issued after the act of 1857 was passed and its

provisions had been accepted by the company; and the act was accepted by the company prior to the time when it authorized the execution of the conveyance of its lands in trust to Moore, Wilson, and Waterman. Indeed, the conveyance to these trustees in terms refers to the act of 1853 and 1857, and recognizes the priority of the State to the extent provided for in these acts; but in reciting *that* upon which the lien of the state attached, the language of the act of 1855 is followed, and the word "property," used in the act of 1857, omitted, apparently *ex industria.*

It is unnecessary to consider whether the lien provided for in the act of 1853 upon "the road and every part and section thereof, and its appurtenances," extended to the lands which had been granted by Congress, because the State was equally entitled to the security provided for in the act of 1857, which was "a first lien or mortgage upon the road and property of the company."

This legislation has been construed by the supreme court of Missouri (*Whitehead* v. *Vineyard*, 50 Mo. 30). In the case just cited that court decided that, by the act of 1857, the State's lien extended to "all the corporate property of the companies named in the act," to lands as well as to the road proper, and even to lands subsequently acquired by the companies, as well as to those owned by them when the act was passed. We do not stop to inquire whether the nature of the case is such (the State having been a party in interest) that the construction of the state legislation by the highest tribunal of the state should not conclude us; for it will be admitted that a different judgment is not to be here pronounced, resulting in disturbing or overturning titles held good in the state tribunals, unless the opinion of the state supreme court is clearly erroneous.

Upon the best consideration we have been able to give to the subject, we concur in the opinion that by the act of 1857, however it would have been under the act of 1855,

the lien of the state extended to the lands as well as to the road proper and its appurtenances.

We mention briefly the reasons that give support to this conclusion:—

1. The anxiety of the State to have full security is manifest on the face of all the enactments relating to the subject, and hence the provision for a first lien or mortgage, which was not only to be upon the road, but upon the property of the company.

2. The terms "road and property" are general and comprehensive, and as the word "property" was specially inserted in the latter enactment, it must be supposed, particularly in legislation of such great moment, that it was advisedly done either to close doubts, or to extend the lien to property which would not be embraced by the words "road and its appurtenances." The lien extends not only to the road, but in addition to the property of the company—to property which would not or might not be embraced by the language "road and appurtenances." What property was meant? What so likely as the lands of the struggling companies, which, without the aid of the State by bonds, were unable to go on with their enterprises, and what more appropriately than lands falls within the comprehensive term property?

3. If the lands of the company be excluded from the mortgage, it is difficult to give a construction to the act which will give any adequate or considerable significance to the word property.

The plaintiff's counsel argues that the act of 1857 "gave the State a mortgage upon nothing other than the road and property of the company held for the purpose of the road," and he adds: "The term property can be well satisfied without giving it the interpretation of including all the land granted the road, not for its purposes of a railroad corporation, but in aid of the construction of the road. The

term property is evidently meant to include, and to include nothing more, than the road-bed, rails upon it, turn-outs, depots, erections, buildings, franchises, locomotives, passenger and freight cars, hand cars, tenders, tools, machinery, materials, etc. and all property as part and necessary part of the entire establishment, movable or immovable, essential to the production of tolls and revenue."

But would not all this, or substantially all this, unless it be the franchise of being a corporation, be covered by a mortgage upon the road of the company, or the road and its appurtenances?

Under this view the defendant's landlord has the title, and this makes it unnecessary to determine whether the plaintiff would also fail for the reason that the deed to Hamilton was never executed or delivered by the trustees so as to be operative as a conveyance of the lands described therein.

TREAT, J. concurs.

JUDGMENT FOR THE DEFENDANT.

NOTE.—A special finding of facts was made, and the case taken to the supreme court.

Further, as to legislation of the state of Missouri in aid of railways, and the rights of the grantees of the state, see *Murdock* v. *Woodson*, *ante*.

In re DONALDSON.

Under section 29 of the bankrupt act, where there are no assets, the district court *may* grant an application by the bankrupt for a discharge, although not applied for within a year, where the delay is satisfactorily excused.

(*Before* DILLON, *Circuit Judge*.)

Bankrupt Act.—Discharge of Bankrupt.—When to be Applied For.

Petition for review, under section 2 of the bankrupt act, of an order of the district court refusing the bankrupt a discharge in a case where there were no assets.

Mason G. Smith, for the petitioner for review.

Daniel Dillon, opposed.

Dillon, *Circuit Judge.*—Petition for review, under section 2 of the bankrupt act, of an order of the district court refusing to grant the bankrupt a discharge because the application was not made within a year. I think the opinion of the district court, which accompanied the order under review, correctly construes section 29, as applied to all cases where some good reason is not shown why the application was not made within the year. The second petition by the bankrupt having been filed after the year, it ought to have stated the reasons for the delay, and these may be controverted. Where there has been no fraud on the part of the bankrupt, and his conduct is irreproachable, and no injury to creditors has resulted from the delay to make the application, it would be a hardship upon him to deny a discharge merely on the ground of a failure to ask for it within the year, or to apply rigorously an inflexible bar of one year to an application otherwise meritorious. Required in the exercise of supervisory jurisdiction to hear and determine the case "as a court of equity," I affirm the order under review; but on the payment of the costs by the bankrupt in connection with his application, the district court will give him leave, if he is so advised, to amend his petition for a discharge so as to present a case which, if equitable, will excuse the delay in not making the application within the year.

Ordered accordingly.

In re O'FALLON.

(*Before* DILLON, *Circuit Judge.*)

Sale of Property by Assignee in Bankruptcy.—Approval by Court.

Per Curiam. — WHERE a public sale of the real estate is made by the assignee in bankruptcy under the order of the bankruptcy court, and the property is struck off to the highest bidder, such sale is subject to the approval of the court, which has a discretion to refuse to confirm it for mere inadequacy of price. It is not necessary that there should be fraud or such gross inadequacy of price as to be evidence of fraud.

S. W. Dooley, for the purchaser.

S. S. Boyd, for the assignee.

In re PICTON.

1. The *second section* of the bankrupt act gives to the circuit court jurisdiction to review, upon a proper record, an order of the district court, upon a trial before it without a jury, adjudicating the petitioner a bankrupt.
2. Where all of the testimony in the district court on the trial of such an issue was reduced to writing, preserved by bill of exception, and certified to the circuit court, the latter court *can review* the correctness of the order of the district court adjudging the petitioner a bankrupt.
3. But in such a case the appellate court *will not reverse* on a question of fact unless the judgment below is, in its opinion, clearly erroneous.
4. Testimony considered to establish the *fraudulent transfer* of property charged as an act of bankruptcy.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Second Section Construed.—Revisory Jurisdiction of Circuit Court.

THIS is a petition, under the second section of the bankrupt act, to review and reverse an order of the district court adjudging the petitioner a bankrupt. The petitioning creditors, Sterling Price & Co. charge as an act of bankruptcy that the present petitioner purchased of them three hundred and four bales of cotton at the price of $22,000; that it was expressly agreed that payment therefor was to be made in cash on delivery; that Picton, by means of the promise to pay on delivery, obtained possession of the cotton, and, without making payment therefor, immediately shipped the same to New York, and transferred the bills of lading with intent to hinder, delay, and defraud his creditors.

An answer was filed denying the act of bankruptcy charged, and, no jury having been demanded, the issue was tried to the court, which, upon the testimony produced, found against the debtor. The testimony before the district court was preserved by a bill of exception signed by the district judge, and is in the record of the present proceeding. The present petitioner seeks to reverse the order adjudging him a bankrupt, on the ground that the court below erred in holding that the evidence established the act of bankruptcy alleged. This is the only error of which he complains.

Bakewell, Farish, & Mead, for the petitioner for review.

Hill & Bowman, for the petitioning creditors.

DILLON, *Circuit Judge.*—1. The petitioning creditors object that the circuit court, in the state of the record, cannot review the order by which the present petitioner in review was adjudicated a bankrupt, and insist that if such an order

can be here revised at all, it must be upon writ of error. It will be observed that the issue below was tried to the court, and not a jury, and that all of the evidence upon which that court acted is preserved of record and is certified to this court. I am of opinion that the case falls within the general supervisory jurisdiction of the circuit court, and that the decision below may be reviewed, all of the testimony having been preserved.

In *Morgan* v. *Thornhill*, 11 Wall. 65, 78, 79, Mr. Justice CLIFFORD, speaking of such cases, says, *arguendo*, that where the issue is tried by a jury, "the case is excluded from the general superintendence and jurisdiction of the circuit court by the exception introduced as a parenthesis into the body of that part of the section." But he adds: "Such cases may be tried by the district court without a jury, and in that event no doubt is entertained that the case is within the supervisory jurisdiction of the circuit court." In *Perry* v. *Langley*, 2 Bankr. Reg. 180, Mr. Justice SWAYNE held that the circuit court could, upon petition for review, revise the ruling of the district court upon a petition in involuntary bankruptcy.

2. But while I may thus review the decision of the district court on a question of fact, yet the ordinary rule governing appellate tribunals should apply, viz: that to justify a reversal, the finding below should be clearly erroneous. The rule rests upon good reasons. The court below sees the witnesses face to face, while the appellate tribunal sees them only on paper; and this gives the former court advantages in passing upon the weight of evidence which the latter court does not possess. I have gone through the one hundred and fifty pages of testimony in the record, but as it would conduce to no useful end to discuss it at length, it must suffice to say that it has not produced upon my mind the conviction that the conclusion oi the district court was erroneous. I may add that I do not think the testimony

establishes that the present petitioner, in the purchase of the cotton of the petitioning creditors, premeditated any scheme to defraud them; but his purchase was expressly for cash on delivery (that is, upon inspection and acceptance), and his action in his embarrassed circumstances in at once, before inspection and acceptance, taking the cotton notes, that is, warehouse receipts, for the cotton which he had received from the sellers in order to inspect, and pledging them to his banker to make his account good, and subsequently assigning to him the bills of lading for the same cotton, he, meanwhile, on various grounds, putting off or refusing to pay the seller, though superinduced by the stress of his circumstances, and though he may have hoped in the end to make payment for the cotton, was not improperly regarded by the district court as being legally, if not intentionally, fraudulent, in that it did hinder, delay, and defraud his vendors, and should, in law, be taken to have been intended to effect the result which it accomplished.

AFFIRMED.

In re HEZEKIAH, Bankrupt.

1. The *exemption of personal property* of the value of $2,000 from judicial sale, by the constitution of Arkansas of 1868 (Art. 12, sec, 1), is self-executing, and its provisions are exclusive, and not cumulative.
2. This provision of the constitution, construed, in connection with section 14 of the bankrupt act and its amendments (17 Stats. at Large, 334; *ib.* 577), and it was held that the bankrupt was limited to an exemption of property whose value in the aggregate did not exceed $2,000.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Exempted Property.—Constitution of Arkansas as to Exemptions, Construed.

THIS is a petition, under the second section of the bankrupt act, to review and reverse an order of the district court, "That the bankrupt shall select as exempt such property as he may choose, not to exceed in the aggregate the sum of $2,000, out of any personal property belonging to his estate." The bankrupt excepted to so much of the order as limited his claim to exempted property to the sum of $2,000. The claim of the bankrupt, filed in the district court, was as follows: —

Under section 14 *of the bankrupt act*, he claimed household furniture, &c. to the amount of	$ 287
Under the state law, he claimed "tools belonging to his trade" of tinner	100
Wearing apparel	50
Horse and wagon	125
Hardware and tinner's stock, to be selected out of stock in trade	1,875
Total claimed as exempted	$2,537

A statute in force at the time of the adoption of the present constitution of Arkansas reads as follows: "The following property, when owned by a married man, with a family, shall be exempted from execution: First, one horse, mule, or yoke of oxen, one cow and calf, one plow, one axe, one hoe, and one set of plow gears, if the person against whom any execution may be issued is a farmer; second, the spinning-wheels and cards, one loom and apparatus necessary for manufacturing cloth in a private family; third, all the spun yarn, thread, and cloth, manufactured for family use; fourth, any quantity of hemp, flax, cotton, and wool, not exceeding twenty-five pounds; fifth, all wear-

ing apparel of the family, two beds, with the usual bedding and such other household and kitchen furniture as may be necessary for the family, agreeably to an inventory thereof, to be returned on oath, with the execution, by the officers whose duty it may be to levy the same; sixth, the necessary tools and implements of trade of any mechanic, while carrying on his trade; seventh, all arms and military equipments required by law to be kept; eighth, all such provisions as may be on hand for family use." (Gould's Dig. chap. 68, sec. 23.) The constitution afterwards adopted, in 1868, provided that "The personal property of any resident of this state to the value of $2,000, to be selected by such resident, shall be exempted from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of this constitution." (Const. Ark. art. 12, sec. 1.) The same constitution also provides that "All laws of this state not in conflict with this constitution, shall remain in full force until otherwise provided by the general assembly, or until they expire by their own limitation." (*Ib.* art. 15, sec. 16.)

One question is, Is the former law repealed by the provision of the constitution?

Another question arises under section 14 of the bankrupt act and the amendments thereto. This section exempts "the necessary household and kitchen furniture," &c. not to exceed in value $500, wearing apparel, uniform, &c. property exempt by the laws of the United States from seizure under execution. And then follows this clause: "*And such other property not included in the foregoing exceptions* as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864." Afterwards Congress amend-

ed this by striking out "1864," and inserting "1871" in lieu thereof. (Act of June 8, 1872, 17 Stats. at Large, 334.) Some controversy having arisen as to whether this provision applied to debts contracted prior to the time of the passage of the amendment, Congress, on the 3d day of March, 1873, passed a declaratory act, as follows: "That it was the true intent and meaning of an act approved June 8, 1872, entitled "An act, &c. that the exemptions allowed the bankrupt by the said amendatory act should, and it is hereby enacted that they shall be, the amount allowed by the constitution and laws of each state, respectively, as existing *in the year* 1871, and that *such exemptions* be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against him, by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws notwithstanding." (17 Stats. at Large, 577.)

Rose & Green, for the bankrupt.

Benjamin & Barnes, for the assignee.

Dillon, *Circuit Judge.*— 1. I am of opinion that the exemption provided by the constitution (Art. 12, sec. 1) executes itself, and that such exemption is exclusive, and not cumulative. The enlarged, and, as compared with the then existing statute provision, *generous* exemption given by the constitution in favor of *any resident*, without regard to his trade or condition or relations in life, with the privilege to him to select the property he desired to retain, seems to me to evince an intention to supersede the more narrow provisions which the statute had strictly limited, if not reluctantly given.

2. As all the property is personal, my opinion is, that the bankrupt is not entitled to claim, under the constitution

of the state (Art. 12, sec. 1), $2,000 in addition to his household and kitchen furniture, &c. Household and kitchen furniture, &c. may be claimed as exempt under the bankrupt act (sec. 14), and this act then provides "that there shall be exempt such *other* property *not included* in the foregoing exceptions, as is exempt by the laws of the state in which the bankrupt is domiciled. There cannot be a double exemption of the same property; and, as the $2,000 embraces all the property which is exempt by the state constitution, including household and kitchen furniture, wearing apparel, &c. the value of the latter, if selected by the bankrupt, ought, under the spirit if not the letter of section 14, be deducted from the $2,000, and he be allowed to select other property, so as, in the aggregate, to amount to that sum. I reach this conclusion upon the language of section 14 and the amendment of June 8, 1872 (17 Stats. at Large, 334), without resting upon the act of March 3, 1873 (*Ib.* 577), as having any controlling effect in this respect.

AFFIRMED.

LUTHER H. PIKE, *et al.* *v.* JOHN WASSELL, *et al.*

1. Under the *confiscation act* of Congress of July 17th, 1862 (12 Stats. at Large, 589), no interest in land could be forfeited which would extend *beyond the life* of the offender.
2. Where, under said act, a decree was entered condemning as forfeited real estate for and during the life of the owner thereof, *his children* cannot, during his life-time, file a bill to question the validity of subsequent sales on execution against the father of his reversionary estate in the property.
3. A decree condemning as forfeited an estate for the life of the owner does not immediately cast the entire beneficial estate in the property upon his children so as to make them, while he is still living, his heirs.

(*Before* DILLON, *Circuit Judge.*)

Confiscation Act.—Effect of Forfeiture of Life Estate in Lands of the Offender.

The plaintiffs describe themselves in the bill of complaint as "the children and heirs-at-law of Albert Pike, who was formerly a citizen of the state of Arkansas, but is now a citizen of the state of Tennessee, residing in the city of Washington," in the District of Columbia.

The bill sets forth that on the 17th day of July, 1862, their father was seized, in fee of certain real estate in the city of Little Rock, and that at the date of the passage by Congress of the confiscation act of July 17th, 1862 (12 Stats. at Large, 589), and subsequently the said Albert Pike was a general in the Confederate army, and that after his resignation as such officer he afterwards, to-wit, on the 16th day of February, 1865, acted as judge of the supreme court of the state of Arkansas, after the passage by that state of the ordinance of secession, and at a time when the said state was acting under the constitution of the Confederate States; that on the said 16th day of February, 1865, the marshal of the United States seized the real estate of the said Albert Pike, described in the bill, under the said confiscation act, and on due proceedings had the district court of the United States for the eastern district of Arkansas, on the 5th day of April, 1865, entered a decree condemning and forfeiting to the United States the interest and estate of the said Albert Pike in and to said real estate *for and during the natural life of the said Albert Pike*, and directing the same to be sold for the benefit of the United States. It is shown that the said life interest was subsequently, May 1st, 1865, sold and conveyed by the marshal. About the time said real estate was so seized, several actions at law were commenced by attachment in the *state* court against Albert Pike, and at the September term, 1865, judgments were rendered therein against him, on an appearance entered by his son, Luther

H. one of the present complainants. The bill avers that this appearance was never authorized by the said Albert, and that the defendant, Wassell, fraudulently induced the said Luther H. to enter it, and waive service by publication. At the April term, 1867, the real estate of the said Albert Pike, which had been seized as aforesaid by the marshal and condemned as forfeited by the United States district court, being the same which had been attached in said actions in the state court, was sold on executions issued on said judgments rendered in the state court, to the defendant. It is averred in the bill that this sale was for an inadequate price, but this is denied in the answer.

The bill contains also averments tending to show an equity or right in favor of Albert Pike or his heirs, if the plaintiffs are such, arising out of an alleged agreement between the defendant, Wassell, and the said Luther H. Pike, acting as attorney of Albert Pike, in respect to the said judgments and execution sales thereunder, but in the view taken by the court it is not necessary to state this portion of the case at any greater length. The defendant subsequently became the owner of the life estate or interest which was sold by the marshal under the confiscation decree, and claims thus to be seized in fee of the *whole estate* in the lots in controversy. The bill admits the validity of the confiscation proceedings, and that the life estate of the said Albert Pike was sold, and this is also admitted by the defendant. But the bill denies the validity of the judgments against Albert Pike, rendered by the state court, and the validity of the execution sales and sheriff's deeds thereunder. On the other hand, the answer, which is made also a cross bill, insists upon the validity of said judgments and execution sales.

The bill proceeds on the theory that the plaintiffs, as the heirs-at-law of Albert Pike, are the owners of the reversion after the determination of the life estate, condemned and

sold by the United States, and the object of the bill is to compel the defendant, as the tenant for life, out of the rents, to keep down the taxes, and properly to care for and preserve the property.

The pleadings and exhibits are voluminous, but this outline of the case is sufficient for an understanding of the question decided by the court.

A. H. Garland, and *Dodge & Johnson*, for the plaintiffs.

T. D. W. Yonley, and *Wassell & Moore*, for the defendant.

DILLON, *Circuit Judge*.—Both parties agree that Albert Pike was seized in fee of the lots in controversy, and that the United States condemned and sold only an estate therein for and during *his natural life*. Both parties admit that the proceeding was valid, and that to this extent the title of Albert Pike was divested and is now in the defendant. It is stated in the bill that Albert Pike is still living. The substantial point in dispute is as to the ownership of the reversion, or of the estate other than life estate which was forfeited to and sold by the United States under the act of July 17th, 1862. The defendant claims this reversionary estate under the execution sales by the sheriff. The plaintiffs claim the same estate as "the children and heirs-at-law" of their father. As the plaintiffs claim only as heirs, it follows that if they are not *now* the heirs of Albert Pike, the foundation of the relief sought by the bill fails. Their case rests, and rests alone, upon this proposition. This their counsel concede in argument. They insist that the decree of condemnation and sale, though it was but of the life estate of Albert Pike, deprived him of all beneficial interest in the property and cast the descent or effected a settlement of it upon his lawful heirs, the same as though he were dead, and that it does this so effectually as to disable

the father or ancestor from making any conveyance of the reversion to others, or from making any disposition of it by will, and so to prevent his creditors from seizing and selling it upon judicial process. Accordingly the plaintiffs' counsel in their printed argument say: "The theory of the bill is, the confiscation swept away Albert Pike's interest in the property, but in view of the constitutional provision as to attainder, the right of his heirs was protected, and upon them, under this constitutional provision, the confiscation threw the property, after his death, regardless of all events that occurred after he, Albert Pike, entered the army against the United States. In other words, the law not only divests him of his estate for life, but casts the descent and fixes it upon his heirs."

The proceedings to condemn the property were had under the confiscation act, and under that no interest in real estate could be forfeited which would outlast the life of the offender. (*Bigelow* v. *Forrest*, 9 Wallace, 339). Not only so, but nothing was condemned and sold, except an interest for the life of Albert Pike.

No authoritative construction of the confiscation act has been produced to sustain the theory upon which the bill rests, and upon the best consideration I have been able to give to the subject, I find nothing to support it, either in the language of the act, or in its policy, or in the general principles of the law. It is a solecism to say that the plaintiffs' are the heirs of their father, who is still living; and if they were or could be such heirs, it would be remarkable if they would take the property by operation of law, discharged of their ancestor's debts. But I place my decision upon the sole ground that the plaintiffs, during the life of their father, are not his heirs, and are not *now* entitled to be considered as the reversioners or possessed of any estate in this property. This view, if sound, is decisive of the case, and on this ground alone the bill will be dismissed. If the

judgments in the state court, or the execution sales thereunder, are void, they may be attacked by Albert Pike. And so if there is any equity or right, by reason of the alleged understanding or agreement with the defendant, Wassell, it exists in favor of Albert Pike, and cannot be asserted by the plaintiffs as his heirs during his life.

As the plaintiffs have no present interest in the property, and may never be the heirs of the said Albert Pike, it follows that the cross bill founded upon the asserted validity of the execution sales presents matters which cannot be adjudicated between the parties to this suit. The result is that a decree must be entered dismissing both the original and cross bill.

DECREE ACCORDINGLY.

NOTE.—As to validity of proceedings and decrees under the act of July 17th, 1862, see *Brown* v. *Hiatt*, 1 Dillon, 372, and note; S. C. on appeal, 15 Wall. 177.

JOHN H. WAGGENER AND WIFE *v.* MARK R. CHEEK, Administrator, &c. OLIVER P. LYLES, *et al.*

1. Whether, under the act of March 2, 1867, which requires the application for *the removal of a cause* from the state court to the federal court to be made "before the *final hearing* or trial of the suit," a suit in equity can be removed when pending in an appellate tribunal, *quære?*
2. Such a suit cannot be removed from the appellate court after it has been *finally submitted* to it.
3. Nor can it be removed by the plaintiff as to *one of several* necessary defendants.

(*Before* DILLON, *Circuit Judge.*

Removal of Causes from State to Federal Court.—Act of March 2, 1867.—Final Hearing or Trial.—Removal from Appellate Court.

This cause comes before the court on the transcript of a record certified by the clerk of the supreme court of the state of Arkansas.

Upon the question, whether this court has *jurisdiction* of it, the following are the material facts as shown by the record: The suit, which was in equity, was originally brought in one of the state courts, and the complainants sought to be relieved from the obligation to pay the purchase price ($75,000) of certain property which the complainant (Waggener) purchased from the executor of Elijah Cheek, deceased, and for which, except the sum of $10,000, paid in cash, the complainants made notes to the executor, and, to secure the same, executed a deed of trust to Lyles, one of the defendants. The ground of complaint in the bill is, that the executor had no power to make the sale, because the probate court had no authority in law to probate and establish a *lost* will, and because the decree of the chancery court establishing said lost will was void, for the reason that such of the heirs of law of the said Elijah Cheek as were not provided for therein were not notified of the proceeding. The bill makes defendants the executors of Elijah Cheek, the heirs at law, several in number, of the said Elijah, and also Lyles, the trustee in the deed of trust to secure the purchase money. Answers were filed to the merits by the various defendants, and made cross-bills. Pending the proceedings in the state court, two injunctions against the sale of the property by the trustee under the deed of trust were granted and dissolved, and a receiver was appointed with power to lease the property. Finally, at the October term, 1869, the cause came on for hearing on the bill and exhibits, and the answers and cross-bills, and the court decreed that the proof of the will in the probate and chancery court and the grant of letters testamentary were not void; that the executor had full power to make the sale to the complainant, and thereupon dismissed the complainants' bill;

but on the cross-bill rendered a decree of foreclosure in favor of the estate of Elijah Cheek against the complainant for the balance of the purchase money and interest, then amounting to $88,333.98, and ordered a sale of the property embraced in the deed of trust. From the decree the complainants prayed an appeal (which was granted) to the supreme court of the state.

The record of the proceedings in the *supreme court* shows that on the 3d day of January, 1871, "the parties, by their respective attorneys, *submitted the cause* to the court on briefs, and that it was by the court taken under advisement." The clerk of the supreme court certifies that "Afterwards, at the December term, 1871, said appellants, through the clerk of this [the supreme] court, presented to said court the following petition and bond, which said court failed to order filed, or to take any action upon whatever." The petition referred to is one by the complainants for the removal of the cause into the circuit court of the United States for the eastern district of Arkansas, and states that the plaintiffs are citizens of Tennessee, and that defendant, Mark R. Cheek, administrator of the estate of Elijah Cheek, is a citizen of the state of Arkansas; that the amount exceeds, &c.; that they have filed their affidavit under the act of Congress of March 2, 1867, for the removal of the cause, stating, &c. and offering surety, &c.

The affidavit for removal is in these words: "That plaintiffs are citizens of the state of Tennessee; that Mark R. Cheek, administrator, &c. is a citizen of Arkansas; that administration upon said estate is had and conducted in the state of Arkansas, of which state the deceased was, at the time of his death, a citizen; that the matter in dispute exceeds the sum of $500; and the plaintiffs have reason to believe that from prejudice or local influence they will not be able to obtain justice in this honorable court." This was sworn to January 4, 1872. A bond was also filed for

the removal of the cause, conditioned as required by the act of Congress. The clerk of the supreme court certifies a complete transcript of the record of the cause as it remains in that court, but it contains no entry of any further action by it in respect to the same.

U. M. Rose, and *B. C. Brown*, for the complainants.

O. P. Lyles, and *Clapp, Vance, & Anderson*, for the defendants.

DILLON, *Circuit Judge*.—From a decree against the complainants on the merits in the inferior state court, they took an appeal to the supreme court of the state and fully submitted the cause to that court, by which it was taken under advisement. While it was in this situation, the complainants filed their petition and affidavit for the removal of the cause to this court under the act of Congress of March 2, 1867. (14 Stats. at Large, 558.) Do the petition and affidavit present a case entitling the complainants to a removal of the cause to this court? This depends upon a proper construction of the act of Congress just mentioned. It is our opinion that the case is not one of which, upon the showing made for the removal, this court can take cognizance. The ground of this conclusion is two-fold: —

1. The application for the removal was not made in time. The statute requires the petition for the removal to be made "before the final hearing or trial of the suit." The statute which it purports to amend uses the words, "before the trial or final hearing of the cause." (14 Stats. at Large, 307.) The word "hearing" refers to equity suits; the word "trial" to actions at law. This cause was in equity, and the requirement of the statute is that the application for the removal must be made "before the *final hearing*." In a case at law it must be before the *trial*. Where the suit is properly removed, the provision of the act is that it shall

"proceed," in the federal court, "in the same manner as if it had been brought there by original process." There is ground to contend that the statute does not apply in any case when the suit is in the appellate court; but the circumstances of the cause in hand do not require us to decide that point. Suppose there had been a trial at law, a judgment, a bill of exceptions, and a writ of error, and the plaintiff in error, after the cause is filed and when it is pending in the appellate court, removes it to this court, can we review the alleged errors? Surely not. Is the party who effected the removal to have a new trial here as of right? Clearly not. It would appear, then, that a law case cannot be transferred to this court while it is still pending in the state appellate tribunal. This is certainly so where the trial was by jury. (*The Justices* v. *Murray*, 9 Wall. 274.) Under the words applied to both classes of cases, "final hearing or trial," will it be held that a law action cannot be transferred from the state appellate tribunal, while an equity suit may be? The argument in favor of the right to transfer an equity cause while it is pending on appeal is, that it is there to be heard *de novo*, and that an appeal in chancery cases is only a re-hearing in a higher court. (3 Dan. Ch. Pl. & Pr. 1602.) But the question turns on the intention of Congress in the use of the words, *final hearing;* and did it not mean by this language the trial of an equity cause upon the merits in the court of original jurisdiction, rather than the re-hearing in an appellate tribunal? But, as above observed, it is not necessary in this case to decide the question, and we pass it without further remark. It may be conceded, that where a suit has been remanded by the appellate court to the inferior state court for a new trial or hearing on the merits upon further testimony, that the cause may be removed from that court to the federal court, as in *Akerly* v. *Vilas*, 8 Am. Law Reg. (N. S.) 229; *ib.* 558; or that an equity cause may be thus removed directly from the appellate court while it is

still pending therein and before it has been there finally heard, as in *Sneed* v. *Brownlow*, 4 Coldwell (Tenn.), 254. This may be conceded, and yet the removal in the case before us be unauthorized. Clearly the application to remove must be made before the *final hearing*. Granting that the final hearing is the hearing in the appellate court, when must the application for the removal be made? The answer of the statute is *before* the final hearing. But this cause was submitted to the supreme court on the merits, on briefs, and by the court taken under advisement months before the petition and affidavit for removal were presented to that court. Taking the most liberal view for the complainants, the cause was finally *heard* when it was submitted to the court for decision upon the merits. The language of the statute is not that the application for removal shall be before final judgment or decree, but before final hearing, and in an equity suit, the word "hearing" means a trial upon the merits.

2. The cause was not properly removable on the affidavit and petition, for other reasons. It was sought to be removed only as to one of the defendants, namely: Mark R. Cheek, the administrator of Elijah Cheek, deceased. But there were other defendants, and necessary defendants, to the bill. Not to mention others, it is sufficient to refer to the trustee, Lyles, who would be a necessary party to the relief sought. Again, some of the defendants had a cross-bill upon which substantial relief was prayed. The decree of the state court passed upon all these matters, and from that decree the complainants appealed to the supreme court of the state, in which, as to *all* these parties, the suit was pending at the time the application for removal was made. Now the complainants ask for a removal as to one of the defendants only, or rather show cause for removal as to one only. What becomes of the cause as to the other defendants? Under the act of 1867 there seems to be no authority to a

plaintiff to remove a case as to part of several defendants; certainly there is no authority for such removal where the other defendants, not named in the affidavit or petition for removal, are necessary parties to the final determination of the controversy.

An order will be entered dismissing the case out of the court for want of jurisdiction.

ORDERED ACCORDINGLY.

NOTE.—As to act of March 2, 1867, see *Johnson* v. *Monell*, 1 Woolw. 390; *Sands* v. *Smith*, 1 Dillon, 290, 295; *Case* v. *Douglas*, *ib.* 299; *Allen* v. *Ryerson*, *ante.*

In *The Justices* v. *Murray*, 9 Wall. 274, the supreme court held that it was not competent for Congress, under the seventh amendment of the constitution, to provide for the removal of a judgment in a state court in which the cause had been tried by a jury to the federal court for a re-trial on the facts and law.

WELLS *v.* RILEY.

1. The value of improvements made in good faith by an *occupying claimant* under color of title are allowed to him by the statute of Iowa in the manner and to the extent therein provided.
2. The Iowa statute in relation to occupying claimants construed, and applied to an occupant of lands falling within the Des Moines river grant.

(*Before Mr. Justice* MILLER.)

Occupying Claimant.—Color of Title.—Good Faith.

THIS was originally an action of ejectment, and the plaintiff recovered in this court, and the judgment was affirmed by the supreme court as stated below. The present questions arise out of the application of the defendant, under the occupying claimant's statute of the state. (Revision of Iowa, ch. 97.)

This statute enacts that "Where an occupant of land has color of title thereto, and in good faith has made any valuable improvements thereon, and is afterwards in the proper action found not to be the rightful owner thereof," he may be allowed in the manner therein provided the value of the improvements.

The facts are as follows: The husband of the defendant, Hannah Riley, settled upon the premises in question in 1855, and in 1857 he died, leaving the defendant and several minor children. The defendant applied to the land officers to be permitted to enter the land. Her application was refused until the decision of the case of Litchfield against the Dubuque & Pacific Railroad Company, in 1860. She then renewed her application and was permitted to enter the land. She proved up in 1862, and obtained a patent in 1863. Plaintiff claimed title to the land under a deed from the Des Moines navigation company, and the navigation company claimed title from the state of Iowa, and the state of Iowa under act of Congress of 1846, and subsequent acts. The circuit court of the United States held that the title was in the plaintiff, Wells. The defendant appealed to the supreme court of the United States, and the decision of the court below was affirmed. Then the defendant, Hannah Riley, filed a petition as an occupying claimant, asking for an appraisement of her improvements, and by agreement of counsel for both parties, the court appointed three commissioners to examine the premises and report to the court the value of the improvements made by the defendant, and in regard to the value of timber cut off and taken away by her, and the value of the rents.

The commissioners in their report found: 1st. Value of improvements, including taxes paid by the defendant, $2,823.89. 2d. Value of rent and use of said land, $300. 3d. Value of timber cut and destroyed by defendant on said land, $170.50. This leaves balance in favor of Hannah Riley of $2,353.39.

Plaintiff's counsel filed a motion to set aside the finding of commissioners, stating exceptions, and relying upon the following extract from the opinion of the supreme court in deciding the main case. The supreme court say: "That the land of which the lot in question was a part had been withdrawn from sale and entry on account of a difference of opinion among the officers of the land department as to the extent of the original grant by Congress of lands to aid in the improvement of the Des Moines river, from the year 1846 down to the resolution of Congress of March 2d, 1861, and the act of August 12th, 1862, which acts we held [in the Walcott case] confirmed the title in the Des Moines company. As the husband of the plaintiff entered upon the lot in 1855 without right, and the possession was continued without right, the permission of the register to prove up the possession and the improvements, and to make the entry under the pre-emption laws, were acts in violation of law, and void, as was also the issuing of the patent. The reason for this withdrawal of the lands from public sale or private entry are stated at large in the opinion in the case of *Walcott* v. *The Des Moines Company*, and need not be repeated. The point of reservation was very material in that case, and we have seen nothing in the present one, either in the facts or the argument, to distinguish it."

Mr. Withrow, for the plaintiff.

Mr. Parsons, *contra.*

Mr. Justice MILLER, orally overruling the exceptions, in substance, said:—

Some of the exceptions taken by plaintiff relate to the question of color of title in the party in possession, and to her good faith in making these improvements. I am very clear that the defendant comes within the rule of the statute in both respects, and within any principle of equity

that can be established on this subject. She had a patent from the United States, and had it for eight or ten years before this action was brought. She had been a settler upon the land and made a showing to the satisfaction of the land office, and received a certificate that she was entitled to pre-emption—the pre-emption commencing thirteen or fourteen years ago. That she has *color of title*, therefore, there cannot be a doubt.

It seems to be supposed that the question of *good faith* is precluded by the conclusion that she must have known that the title would be controverted. It cannot be contended, I think, that she did not make the improvements in *good faith*, believing that she had title. It may be questioned whether such notice as this suit, is, under the circumstances, sufficient evidence to convince a reasonable person that his title may be defective.

Throughout all this contest, up to the time that the case of Wells against Riley was decided in the United States supreme court, I think the fair, reasonable view of it was that she was the owner of this property. Certainly up to the time of that decision, or to 1861, plaintiff had no title to the property. He claims under the land grant of the Des Moines navigation company, and the supreme court of the United States has decided that the act of 1846 conveyed no lands to the state *above* the Raccoon Forks. The plaintiffs here in this action, according to the words of the decision, "must evidently rest their claim to title on the joint resolution of 1861."

They cannot claim title previous to the time the company took its title in 1861 or 1862. Some of the parties claim that rents should be allowed from 1857, and prior. I do not know how many cases of this character there may be, but if there is to be a contest about improvements before the court, some questions will arise which cannot be settled in this case.

As it is, my own conviction is that the defendant is entitled to pay for the improvements she has made.

As to the valuation of the improvements in this case, I must say that I have no doubt but that they are fair and just. As to the value of the timber cut, and the taxes paid, there is no controversy. The value of rents presents a question difficult always to determine. The books are full of decisions of judges modifying and varying the rules by which the value of improvements and rents are to be estimated in cases of this kind, and to deduce a rule which would be applicable to all cases is impossible. My own judgment is that in this case it is probable that enough has been allowed for rent.

The commissioners were selected by the parties and appointed by the court, and I have no doubt they have undertaken to do what was right in the matter. I do not think there is cause for the court to set aside the report. I shall, therefore, overrule all the exceptions.

EXCEPTIONS OVERRULED.

WILKINSON v. UNION MUTUAL LIFE INSURANCE COMPANY, of Maine.

1. Where a life insurance policy contains a condition that if the statements in the application shall be found in *any respect untrue*, it shall be void, untrue answers to specific questions avoid the policy, although relating to matters not materially affecting the risk, and not made with a view to deceive the company. [See *Swick* v. *Home Insurance Company, ante*, 160.]
2. The *local agent* of a foreign company in taking and filling up blank applications entrusted to him is ordinarily to be taken as the agent of the company, and not of the assured, and the company, if true answers to the questions in the application be made by the applicant, will be estopped to take advantage of the mistakes and omissions of the agent in reducing the answers to writing, if the applicant is without fault.

(*Before* DILLON, *Circuit Judge.*)

Life Insurance.— Warranty.— False Answers. — Agent. — Estoppel.

THIS was an action on a policy of life insurance. The defense was the alleged falsity of certain answers in the application for the insurance. The jury found a special verdict, the general nature of which appears in the opinion. A report of the same case in the supreme court of the United States, more in detail, will be found in 13 Wall. 222.

The defendant moved for a new trial, in overruling which the following opinion was given.

Geo. W. McCrary, *John H. Craig*, and *W. J. Cochrane*, for the plaintiff.

Gillmore & Anderson, for the defendant.

DILLON, *Circuit Judge.*—I think the motion for a new trial ought to be overruled. The special findings of the jury dispose of every defense on its merits against the company, except the one relating to the age of the mother of the assured at the time of her death. The special verdict on that subject is fully warranted by the evidence, and being so, the company is justly estopped to make the defense that the applicant misrepresented or untruly stated the age at which her mother had died.

In propounding the questions to the applicant, and in taking down her answers, the local agent acted for his company, and if the applicant made truthful answers, as found by the jury, and the agent wrote down the answers on that subject, which appear in the application, without the knowledge of the applicant, and without being misled by her, acting upon his own judgment, why should not the mistake of the company's agent be visited on the company, rather than on the plaintiff? I am aware of the conflicting views

which different courts have held on this subject, but the one above indicated is well supported by adjudged cases, and is the one towards which, as it seems to me, the judicial sentiment of the country is rapidly tending. *Rowley* v. *Insurance Company*, 36 N. Y. 550; *Viele* v. *Insurance Company*, 26 Iowa, 9; *Miller* v. *Insurance Company*, 3 Iowa, 216, S. C. 7 Am. Rep. 122, and cases cited in note; *Geib* v. *Insurance Company*, 1 Dillon, C. C. 443, 449; *Wilkinson* v. *Conn. Life Insurance Company*, 30 Iowa, 119, which was an action by the present plaintiff on another policy.

JUDGMENT FOR PLAINTIFF.

NOTE.—In *Hiatt, admr. &c.* v. *The Mutual Life Insurance Company of N. Y.* tried at the May term, 1873, the defense was *suicide*, to which the plaintiff replied, *insanity*.

The court ruled:—

1. That it was good cause of challenge to a juror that he considered the fact of suicide as conclusive evidence of insanity.

2. That the burden of proof to establish the insanity was upon the plaintiff. [See *Swick* v. *Home Insurance Company*, *ante*, 160, 166, and cases cited].

3. As to the kind and degree of insanity necessary to be shown to entitle the plaintiff to recover where the assured took his own life, the court followed *Terry* v. *Insurance Company*, 1 Dillon, C. C. R. 403, affirmed, 15 Wall. 580.

There was a verdict and judgment for the defendant. *I. N. Kidder*, and *Gatch & Wright*, for the plaintiff. *Holmes & Reynolds*, and *Polk, Hubbell, & Goode*, for the defendant.

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